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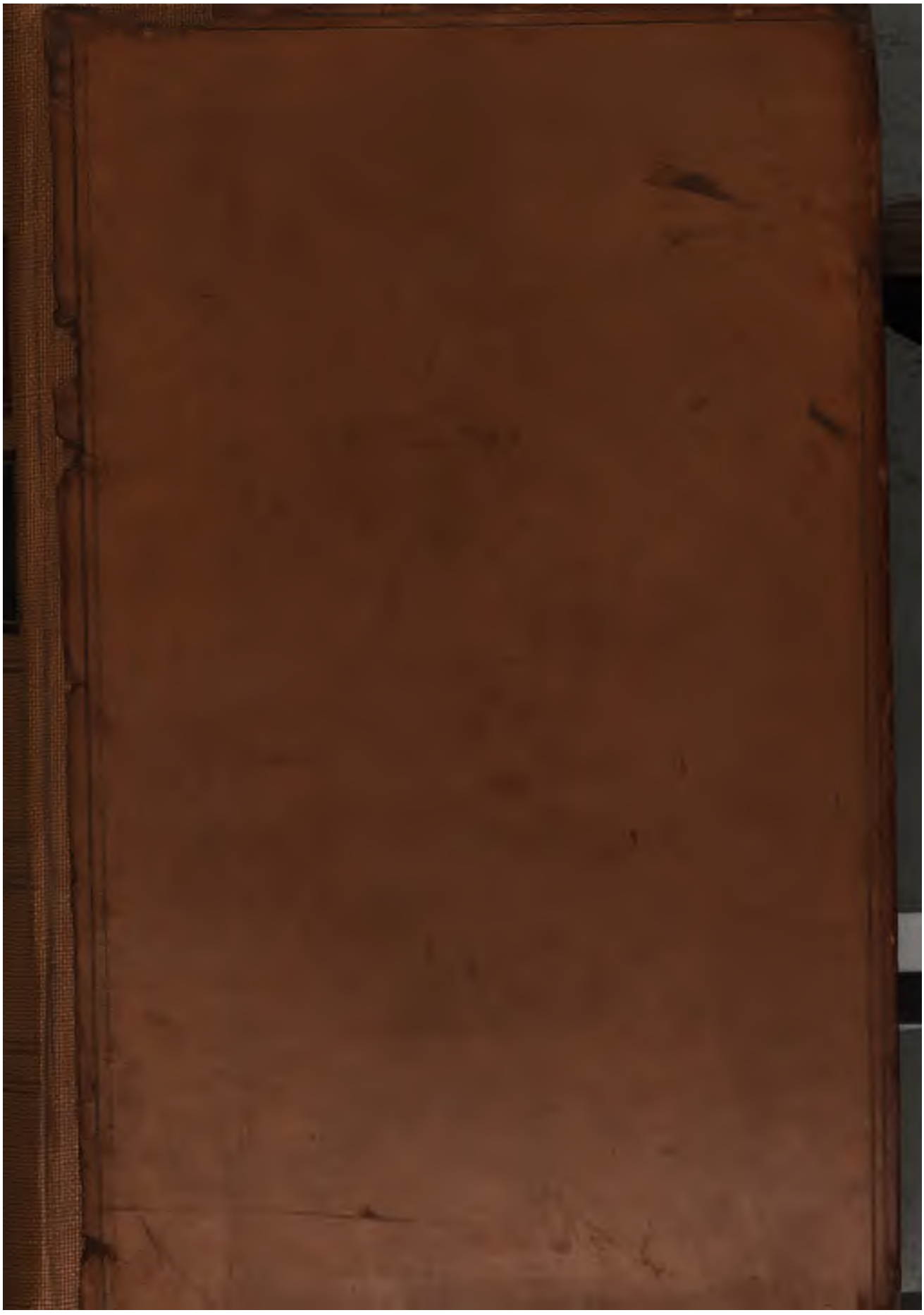

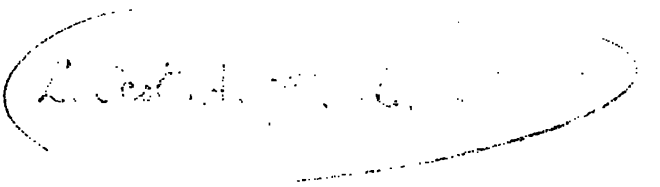

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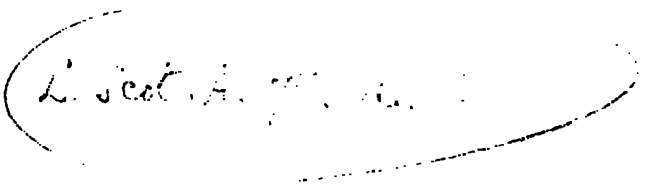

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# CASES

DECIDED IN

# THE HOUSE OF LORDS

ON

# APPEAL FROM THE COURTS OF SCOTLAND.

8° & 9° VICTORIÆ,

SESSION OF PARLIAMENT 1845.

VOL. IV.

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REPORTED BY

SYDNEY S. BELL,

OF THE INNER TEMPLE, BARRISTER AT LAW.

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By Appointment of the House of Lords.

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SIR FREDERICK THESIGER.

*Appointed June*, 1845.

## SOLICITOR GENERAL,

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*Appointed July*, 1845.

## LORD ADVOCATE,

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*Appointed October*, 1842.

## SOLICITOR GENERAL,

ADAM ANDERSON, ESQ.

*Appointed October*, 1842.

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LEGACY DUTY.

The liability of a testator's estate to legacy duty depends upon the locality of his domicile at his death, whether as being within the kingdom or beyond it; and not upon the circumstance of his will having been confirmed or proved, and acts of administration having taken place under it, within the kingdom. Thompson *v.* Advocate General . . . . . 1

LEGITIM.

1. *Held*, that machinery erected by a proprietor of land upon the land, and attached directly or indirectly to it, for the purpose of working the minerals under the land, (including in the machinery loose articles not physically attached to the fixed engines, but necessary for their working, and so constructed as to form parts of the particular machinery, and not to be capable of being applied to any other engines,) was heritable in a question between the heir of the party who erected the machinery and his other children claiming their *legitim*, without regard to the circumstance of the fixed machinery being capable of being removed without material injury, or to the view which the deceased had taken of the machinery as being heritable or moveable, or to the circumstance of the land having been purchased by the deceased with the view mainly of working the minerals under it, and of the machinery forming part of his stock in trade as a coal and iron master. Fisher *v.* Dixon . . . . . 286

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3. *Held*, that machinery erected by a tenant, and removeable by him at the termination of his lease, was moveable in a question as to *legitim*. S. C.

LIEN. See *Ranking and Sale.*

LIFE-RENT AND FEE. See *Fee.*

OBLIGATION.

1. An obligation by a father in the marriage contract of his son to pay the son's widow an annuity, *held* not to be satisfied by an annuity provided by the son to his widow, out of the rents of lands to which he had succeeded as heir under an entail, executed by his father previous to the date of the contract of marriage, and which contained a power of alteration or revocation. Cruickshank *v.* Cruickshank . . . . . 179
2. *Held* that an annuity provided by a son out of the rents of lands which had been purchased with the accumulations of the general estate of his father, after payment of debts, and entailed pursuant to a direction by the father to that effect, could not be imputed in satisfaction *pro tanto* of a joint obligation by the father and son, in the son's contract of marriage, to provide the son's widow in an annuity. S. C.

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*Held* that a contract between two parties to carry on the business of pawnbrokers in the name of one of them alone, followed by the single name appearing on the business premises and in the documents issued to and taken from the customers, was a contract for a secret partnership, and illegal and void, as being contrary to the provisions and policy of the 39 and 40 Geo. III., cap. 99. Gordon *v.* Howden . . . . . 254

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The soil of a public highway continues in the proprietor of the land over which the way has been made, and that although the highway may for forty years have been under the control and superintendence of the general Road Trustees; and the proprietor is entitled to prevent the opening of the way for the purpose of laying down gas or water pipes. Galbreath *v.* Armour . . . 374

RANKING AND SALE.

It is for the Court to consider whether production of the title deeds of the common debtors' lands will be beneficial to the general body of creditors, real as well as personal, and to order a sale of the lands with or without the production, according as it may be of opinion one way or the other. Grant *v.* Findlay . . . 361

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Where a sale of lands is compulsory under the powers of an Act of Parliament, the purchaser must pay the expenses of the conveyance, unless the statute expressly throws them on the vendor. Reddie *v.* Higginbotham . . . . . 268

SERVITUDE. See *Public Highway.*

SOLICITOR AND CLIENT.

To make a solicitor liable for the consequences of acts done by him in his professional capacity, either in damages or in relief of monies paid by the client, the summons must expressly aver want of reasonable skill or gross negligence, or shew facts necessarily raising an inference of one or other. Purves *v.* Landell . 46

TAILZIE.

1. A clause in an entail immediately following the prohibitions, and declaring that if any of the heirs should, "in any time coming, "failzie herein, or do anything contrair to this my destination and "provision," the person "swa failzeing and doing on the contrair "hereof" should lose his right, *held* effectual to resolve any act done contrary to the prohibitions of the entail. Earl of Buchan *v.* Erskine . . . . . 22
2. A clause declaring "all dispositions and other deeds done contrair "to the said provision and destination," to be null, *held* effectual to irritate acts done in contravention of the general prohibitions. S. C.
3. A general reference, in the procuratory of resignation and precept of sasine of a bond of tailzie, to "the reservations, reversion, provisions, and conditions above mentioned," *held* to be a sufficient compliance with the Act, 1685, without the necessity for a repetition of the fetters of the entail. S. C.
4. Terms of irritant clause *held* broad enough to embrace all the prohibitions in the entail. Dingwall *v.* Dingwall . . 149
5. A clause resolving acts done in contravention of the said "con- "ditions and provisions," *held* to embrace prohibitions described as "limitations and restrictions." S. C.
6. It is so settled, that, when an entailed estate comes into the possession of the last member of the entail previous to heirs whatsoever, the fetters are evacuated, that the House refused to hear an argument, whether the character of the particular heirs whatsoever called in this case made any distinction between it and the cases on which the rule is founded. Colville *v.* Colville . 248

TRUSTEE.

1. Trustees or executors purchasing and entailing lands with the residue of a testator's estate, pursuant to a direction in that behalf, *held* personally liable for payment of a bond of annuity granted by the truster. Cruickshank *v.* Cruickshank . . 179
2. A deed by a trustee, in whom the trust estate was vested for the purpose of paying the truster's debts, and thereafter exercising a discretion as to the proportion of the rents to be paid to a life-rentrix by way of aliment, whereby the trustee assigned the trust estate to a creditor of the trust, until he should, out of the rents, have discharged his own debt, and other incumbrances, *found* to be void as *ultra vires* of the trustee. Rennie *v.* Ritchie . 221

VACANT STIPEND. See *Kirk.*

VENDOR AND PURCHASER. See *Sale.*

WIDOWS' FUND. See *Kirk.*

# CASES

## DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

## COURTS OF SCOTLAND.

## 1845.

---

[18*th February*, 1845.]

JOHN THOMSON, Attorney for the Executors of John Grant of Demerara, deceased, *Plaintiff in Error.*

HER MAJESTY'S ADVOCATE GENERAL, *Defendant in Error.*

*Legacy Duty.*—The liability of a testator's estate to legacy duty, depends upon the locality of his domicile at his death, whether as being within the kingdom or beyond it; and not upon the circumstance of his will having been confirmed or proved, and acts of administration having taken place under it, within the kingdom.

ON the 4th of April, 1837, John Grant, a British-born subject, died in the island of Demerara, where he was then domiciled, leaving large personal estate, arising out of money which he had remitted from Demerara to Scotland, for safe custody and investment, and which at his death was owing to him from the parties to whom he had made the remittance.

He left a will bearing date the 16th of December, 1829, by which he appointed executors who were resident in Demerara.

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

The executors appointed Thomson, resident in Scotland, to be their attorney. Thomson confirmed, (or proved,) the will in Scotland, received payment of the money owing to the testator in that country, and out of it paid, in Scotland, several legacies bequeathed by the will to parties resident there.

Demerara was a colony which had been acquired by this country from Holland long prior to the making of Grant's will, and thenceforward to the present time, the law of Holland was the law of the colony. By the law of Holland no duty is payable on legacies as in this country, nor any duty similar to it; neither is such duty payable in the island of Demerara.

In these circumstances, Her Majesty's Advocate filed an information against Thomson in the Court of Exchequer, in Scotland, for payment of £1800, as duty payable on the legacies given by Grant's will.

Thomson demurred to the information. The Court disallowed the demurrer, and gave judgment for the debt with costs. Thomson brought his writ of error.

On the 4th of August, 1842, the case was fully argued by two counsel of a side; *Mr. Pemberton* and *Mr. Anderson*, being for the plaintiff in error, and the Solicitor General, (*Sir William Follett*,) and *Mr. Crompton* for the defendant. But the House, considering the question involved to be one of great and general importance, directed the case to stand over, to be again argued in presence of the Judges of England.

This day, the Judges being present, the case was again argued by one counsel of a side.

*Mr. Kelly* for the plaintiff in error.—The ground upon which the liability for duty is rested by the Crown is the fact of the money having been locally within the kingdom, and having been administered there under the will. The obvious inconvenience and impracticability of this will be seen by supposing that the parties in Scotland, to whom the money

THOMSON v. THE ADVOCATE GENERAL.—18th February, 1845.

was remitted, had upon the testator's death re-transmitted it to his executors in Demerara. There could not then have been any pretext for attaching liability upon the fund, because in that case no administration would have been necessary, and even if liability could have been set up there would not be any means by which the Crown could make it effectual; the debtor would have honestly performed his duty to his creditor, and the money would be withdrawn beyond the reach of the Crown, without any possibility of legacy duty being exacted. On the other hand, no doubt, if the debtor should act dishonestly and not remit his debt, then proof of the will would be necessary in this country, and in this way the Crown might be enabled to obtain payment of the duty, through the liability of the executor proving the will. It is evident, however, that there must be a fallacy in a liability which for its efficacy depends on the honesty or dishonesty of a third party.

The true test of liability is the domicile of the testator; if that be adopted it then becomes immaterial where the property or the executor is, or what the nature of the property is, whether a debt, a chattel, or stock; or whether the testator be a subject or a foreigner. This test is reconcileable with the terms of the statute and the current of authorities.

The 36 Geo. III., cap. 52, in its 2nd section, imposes a duty on "every legacy given by any will or testamentary instrument of "any person." On every principle of legal construction this must be confined to British wills, of persons domiciled in Britain, and cannot be extended either to British colonies or to foreign countries, as none of them are mentioned. If it will embrace the colonies it will equally embrace Ireland, and yet there is another statute expressly imposing legacy duty in Ireland, so that in the case supposed, legacy duty might be twice payable out of an Irish testator's estate. In that view Ireland and the colonies would be taxed without either of them having been mentioned in the statute, or any means having been provided for enforcing payment.

THOMSON v. THE ADVOCATE GENERAL.—18th February, 1845.

If it be said that where a testator leaves part of his property in this country, the duty attaches upon that part, and the other goes free, there is no authority in the terms of the statute for any distinction as to parts; it says "every legacy," which means the whole and not a part. Again, if half the estate were in this country and half abroad, and the whole bequeathed to parties abroad, how much is each legatee to pay; is the duty to be apportioned among them; if so the words of the statute are departed from, and the tax would in fact be one on property, and not on legacies; and how could the apportionment be made, where the legatees stood in different degrees of relationship, and partial payments had been made in the foreign domicile?

Again, the 6th section says that the duties imposed shall be paid by the executor, and shall be a debt against him. This debt then is due at the death of the testator. In a case such as the present, is the debtor of the testator debtor to the Crown, and bound to pay; or is the executor to be the debtor, and the Crown to wait till the executor come within the kingdom? But if the debtor should have given a bill for his debt to the testator in his lifetime, which did not fall due till after his death, must he dishonour his acceptance so that he may enable the Crown to get the duty? Or if the debtor have a branch of his house at Demerara, that branch may be compelled to pay, and what then becomes of the duty, how could it be recovered?

The 27th section requires that, on payment of every legacy, a stamped receipt shall be taken, and without a stamp a receipt shall not be evidence of payment. But no duty is imposed upon receipts in Demerara, which only shows again that the estates of persons resident in Britain was contemplated, otherwise this section would indirectly impose a stamp duty where none was leviable directly.

These and many other inconveniences which might be suggested, all arise from losing sight of the rule that debts follow the person of the creditor, and confounding legacy with probate duty.

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

That rule was pointed out and recognised in Pipon *v.* Pipon, 1 *Amb.* 25, and in Thorne *v.* Watkins, 2 *Ves. Senr.* 35; in both of which cases it was held that a fund administered to by an executor, was to be distributed, not according to the law of the country in which the fund was locally situated at the death of the testator, but of the country in which the testator was domiciled at his death. So in Bruce *v.* Bruce, *Mor.* 4617, the testator was by origin a Scotchman, but was domiciled in India, and part of his estate was in England, subject to the execution of letters of attorney for its investment in Scotland, sent to persons resident there, and it was held that the estate was to be distributed according to the law of the domicile.

In re Ewin, 1 *Cro.* & *Jer.* 151, the testator was domiciled in England, and the estate upon which the question arose consisted of foreign funds transferable in the foreign countries; there it was held that the testator having been domiciled in England, legacy duty clearly attached. Justice Bayley, speaking of Logan *v.* Fairlie, 2 *Sim.* & *Stu.* 284, and Hay *v.* Fairlie, 1 *Russ.* 117, said, "These cases do not seem to me to bear upon the present "question, because there the party was not domiciled within the "limits within which the duties referred to by this Act of Par- "liament reach." In re Bruce, 2 *Cr.* & *Jer.* 436, the testator was a British-born subject domiciled in America, whose assets were partly in England, where his executor and many of the legatees resided; and it was held that the property, though locally in England, was American, and that the duty did not attach. That case was on all fours with the present.

In Jackson *v.* Forbes, 2 *Cro.* & *Jer.*, and 8 *Bli.* 15 *N. S.*, the testator was resident in India, and his estate was locally situated there, but having been sent home by the executors to be distributed in England, which was done without proof of the will, (see 2 *My.* & *Cr.*, 272, *per* Lord Cottenham,) it was argued by the Crown, as it is in this case, that the property having been distributed by parties in England, acting in execution of the will,

legacy duty attached. This was met by explicit argument, which, without denying the distribution alleged, insisted that the statute implied that the property should be situate, and the owner resident in Great Britain, and upon this argument the Court of Exchequer, to whom the case had been sent out of Chancery, returned a certificate that legacy duty was not chargeable.

Arnold *v.* Arnold, 2 *My. & Cr.* 256, was a case somewhat similar. The testator was resident, at his death, in India, where he had long been on military service, and his estate was situated there, but after his death was sent to England, and was there being distributed in a suit in Chancery against the executors, and in the course of the suit, proof of the will being necessary to make the suit perfect, the Crown made a claim for legacy duty. The executors resisted the claim expressly upon the ground that the right of the Crown depended upon the domicile of the testator, and they relied upon Bruce *v.* Bruce as showing that the domicile was India; the Crown again met this by the argument that the liability depended simply upon the fact whether the legacy was paid out of assets administered in Britain, without reference to the domicile of the testator, and as authorities for this the cases of Attorney General *v.* Cockerel, and Attorney *v.* Beatson, and of Logan *v.* Fairlie, were relied upon. Lord Cottenham, after expressing his opinion that upon the terms of the statute the duty was not chargeable, and noticing the authorities relied upon for the Crown, rested his judgment upon Jackson *v.* Forbes, as having authoritatively settled the question that the claim for duty did not depend upon the act of the executor in proving or not proving the will in Britain, but whether, within the meaning of the statute, the property out of which the legacies were payable was the property of a person which passed by the will of that person within the meaning of the Act, which in the previous part of his judgment he had held that it was not, because he was not a person resident in Britain, to whom and to whose property alone the Act could by its terms apply.

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

These cases show conclusively that the domicile of the testator is the test of liability, and the latter case of Arnold *v.* Arnold, is, In re Coales, 7 *Mees.* & *Wels.* 390, where the testator was domiciled in England, treated by *Baron Parke* as having proceeded on that footing; and the Vice Chancellor of England, in the Commissioners of Charitable Donations *v.* Devereux, 13 *Sim.* 14, rests his judgment upon the fact whether the testator had his residence in this country or abroad.

*Mr. Solicitor General* for the Crown.—In terms the statute is limited in its operation to Great Britain, but that operation is not further limited by the fact of the testator's domicile having been within or without Great Britain. If it were so, the discussions which took place in the various cases cited could hardly have arisen; all that would have been necessary on that supposition would have been to inquire as to the fact of domicile; that ascertained, there would have been an end of the case. If this were the law, should the testator have been domiciled in the colonies, the duty would not attach although the whole property might be situated and administered within Great Britain. But in all the cases the question has been, whether there was an act of administration within Great Britain by a person in a representative capacity acting in execution of the will. That has been the test of liability; and the question of domicile has been raised, only to the effect of ascertaining where the party making distribution resided, and where the fund to be distributed was situated. We do not maintain that on any principle it can be possible in every case to make the statute attach; even if that of domicile be adopted, should the testator's estate and his executor be in a foreign country, the duty could not be levied. It is easy to multiply cases of possible inconvenience whatever principle be adopted.

In all the statutes prior to 36 Geo. III., the duty was levied by a stamp on the receipt for the legacy; and the argument that upon the construction contended for by the Crown, duty might

be leviable from inhabitants of colonies or countries where no duty is imposed, would have had equal application to the administration of the law under these statutes; for if the payment were to be made within Great Britain, it could only validly have been made upon a receipt on which the duty was impressed without regard to the domicile of the testator, whether foreign or native. This was changed by the substitution of a duty payable by the executor, but there is no indication in the statute of any intention to alter the liability.

In Attorney General *v.* Cockerell, 1 *Price* 165, the decision went on the fact of the money having come to the hands of the executor within England, for the purpose of being administered according to the will. In Attorney General *v.* Beatson, 7 *Pr.*, 560, the domicile of the testator had been in Madras, but the duty was held to attach, because the estate had been applied in England. In Logan *v.* Fairly, 2 *S.* & *S.*, 284, Sir J. Leach laid down that if part of the assets are in England unappropriated, such part is to be considered as administered in England, and the duty will attach. In another branch of the same case, 1 *My.* & *Cr.* 59, Sir C. Pepys said the observations of Sir J. Leach were consistent with the view the Lords Commissioners took of the case. In Attorney General *v.* Jackson, 2 *Cro.* & *Jer.*, 382, the case turned on the will not having been proved in England, the executors deriving their authority from a foreign jurisdiction, and on the appropriation having been made in India.

In Arnold *v.* Arnold, 2 *My.* & *Cr.*, 256, the Master of the Rolls held, that the duty did not attach, because the administration was unnecessary; and in Hay *v.* Fairlie, 1 *Russ*, 117, because there had been a specific appropriation by the executors in India.

Domicile may regulate the succession to the testator, but it is difficult to see how it is in any way involved in a question of fiscal regulation. In re Ewin *supra*, the first case in which the

question of domicile was raised, the decision was not rested on that, but on the act of administration.

The facts of the present case, so far as regards the question at issue, are precisely the same as in the Lord Advocate *v.* Grant, a case not reported, which occurred in the Scotch Court of Exchequer in the year 1825, in the time of Chief Baron Shepherd, who said the question was, whether the legatees, being foreigners, were to have their legacies reduced by the duty, *i. e.*, whether they were to be subject to the taxes of this country: the duty was in truth an impost upon property.

[*Lord Chancellor.*—Was the legacy in that case out of real estate?]

It was out of money to be raised upon land.

[*Lord Chancellor.*—The estate there could not follow the domicile of the testator. That case does not seem to have application.]

The question is not one of convenience or policy. If it were, domicile would not answer the end, for that question is itself often one of very great difficulty; whereas, the act of administration is the most convenient and the most reasonable, because, if the property be under British protection, it is but reasonable that it should bear British burdens.

The House, without hearing the plaintiff in error in reply, put the following question to the Judges, the Chancellor observing that he had framed it in the terms in which it is expressed, because it was one which equally affected England and Scotland:—

"A. B., a British subject, born in England, resided in a "British colony, made his will and died domiciled there. At the "time of his death, debts were owing to him in England: his "executor in England collected those debts, and, out of the "money so collected, he paid legacies to certain legatees in "England—are such legacies liable to the payment of the legacy "duty?"

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The Judges presently returned the following answer, which was delivered in by Lord Chief Justice Tindal:—

"The question which your Lordships have put to Her "Majesty's Judges is this: 'A. B., a British-born subject, born "'in England, resided in a British colony; he made his will and "'died domiciled there. At the time of his death he had debts "'owing to him in England; his executors in England collected "'these debts, and, out of the money so collected, paid legacies "'to certain legatees in England. The question is: Are such "'legacies liable to the payment of legacy duty?'

"In answer to this question, I have the honour to inform "your Lordships that it is the opinion of all the Judges who "have heard this case argued, that such legacies are not liable to "the payment of legacy duty.

"It is admitted in all the decided cases, that the very general "words of the statute, 'every legacy given by any will or testa-"'mentary instrument of any person,' must of necessity receive "*some* limitation in their application, for they cannot in reason "extend to every person every where, whether subjects of this "kingdom or foreigners, and whether, at the time of their death, "domiciled within the realm or abroad; and, as your Lordships' "question applies only to legacies out of personal estate strictly "and properly so called, we think such necessary limitation is, "that the statute does not extend to the wills of persons, at the "time of their death, domiciled out of Great Britain, whether "the assets are locally situated within England or not; for we "cannot consider that any distinction can be properly made be-"tween debts due to the testator from persons resident in the "country in which the testator is domiciled at the time of "his death, and debts due to him from debtors resident in "another and different country, but that all such debts do equally "form part of the personal property of the testator or intestate, "and must all follow the same rule, namely, the law of the "domicile of the testator or intestate.

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"And such principle we think may be extracted from all the "later decided cases, though sometimes attempts have been "made, perhaps ineffectually, to reconcile with them the earlier "decisions. There is no distinction whatever between the case "proposed to us and that decided in the House of Lords, Forbes "*v.* Jackson, and the Attorney General *v.* Jackson, except the "circumstance that in the present question the personal property "is assumed to be, for the purposes of the probate, locally situated "in England at the time of the testator's death; but that cir- "cumstance was held to be immaterial in the case *ex parte* Ewin, "1 *Crompton* & *Jervis*, where it was decided that a British "subject, dying domiciled in England, legacy duty was payable "on his property in the funds of Russia, France, Austria, and "America.

"And again, in the case of Arnold *v.* Arnold, where the "testator, a natural born Englishman, but domiciled in India, "died there, it was held by Lord Cottenham that the legacy "duty was not payable upon the legacies under his will, his "Lordship adding: 'It is fortunate that this question, which has "'been so long afloat, is now finally settled by an authoritative "'decision of the House of Lords.'

"And as to the argument at your Lordships' bar, on the part "of the Crown, that the proper distinction was, whether the "estate was administered by a person in a representative charac- "ter in this country, and that in case of such administering, the "legacy duty was payable; we think it is a sufficient answer "thereto, that the liability to legacy duty does not depend on the "act of the executor in proving the will in this country, or upon "his administering here, the question, as it appears to us, not "being whether there be administration in England or not, but "whether the will and legacy be a will and legacy within the "meaning of the statute imposing the duty.

"For these reasons we think the legacies described in your "Lordships' question are not liable to the payment of legacy "duty."

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The House then gave judgment in these terms:—

LORD CHANCELLOR.—My Lords, in consequence of something that was thrown out at your Lordships' bar, I think it proper to state that it was not from any serious doubt or difficulty which we considered to be inherent in this question in the former argument, that we thought it right to ask the opinion of the Judges, but it was on account of its extensive nature, and because the question applied only to Scotland in the form in which it was presented to your Lordships' House, whereas in reality and in substance it applies to the entire kingdom, not only to Great Britain, but in substance to Ireland and to all the British possessions. We thought it right therefore, in consequence of the extensive nature and operation of the question, that the case should be argued a second time; and we also thought, from the nature of the question, that it was proper to request the attendance of Her Majesty's Judges upon the occasion, because we thought that the opinion of your Lordships' House being in concurrence with the opinion of the learned Judges, would possess that weight with your Lordships, and that weight with the country, which, upon all occasions, the opinions of Her Majesty's Judges are entitled to receive.

My Lords, it appeared to me, in the course of the argument, that the question turned, as it must necessarily turn, upon the meaning of the statute. In the very first section of the statute the operation of it is limited to Great Britain; it does not extend to Ireland, it does not extend to the colonies; and therefore notwithstanding the general terms contained in the schedule, those terms must be read in connection with the first section of the Act; and it is clear therefore, that they must receive that limited construction and interpretation which is only consistent with the first section of the Act. Accordingly, my Lords, it has been determined, in the case that was cited at the bar, In re Bruce, that it does not apply, notwithstanding the extensive terms, to the case of a foreigner residing abroad, and a will made abroad,

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although the property may be in England, although the executors may be in England, although the legatees may be in England, and although the property may be administered in England. That was decided expressly in the case In re Bruce, which decision has never been quarrelled with, that I am aware of, and in which the Crown seems to have acquiesced.

Also, my Lords, it has been decided in the case of British subjects domiciled in India, and having large possessions of personal property in India, that the legacy duty imposed by the Act of Parliament, does not apply to cases of that description, although the property may have been transmitted to this country by executors in India to executors in this country, for the purpose of being paid to legatees in England. Those are the limitations which have been put upon the Act by judicial decisions.

But then this distinction has been attempted to be drawn, and it is upon this distinction that the whole question turns. It is said that in this case a part of the property was in England at the time of the death of the testator, a circumstance that did not exist in the case of the Attorney General *v.* Jackson, and which did not exist in the case of Arnold *v.* Arnold; and it is supposed that some distinction is to be drawn with respect to the construction of the Act of Parliament arising out of that circumstance. I apprehend that that is an entire mistake; that personal property in England follows the law of the domicile—that it is precisely the same as if the personal property had been in India at the time of the testator's death. That is a rule of law that has always been considered as applicable to this subject; and, accordingly, the case which has been referred to by the learned Chief Justice, the case of Ewin, was a case of this description: an Englishman made his will in England—he had foreign stock in Russia, in America, in France, and in Austria; the question was, whether the legacy duty attached to that foreign stock, which was given as part of the residue, the estate being administered in England; and it was contended, I believe, in the course of the argument, by

my noble and learned friend who argued the case, in the first place that it was real property, but finding that that distinction could not be maintained, the next question was, whether it came within the operation of the Act, and although the property was all abroad, it was decided to be within the operation of the Act as personal property, on this ground, and this ground only, that though it was personal property, it must in point of law be considered as following the domicile of the testator, which domicile was England.

Now, my Lords, if you apply that principle, which has never been quarrelled with, which is a known principle of our law, to the present case, it decides the whole point in controversy; the property, or part of the property, being in this country at the time of the death of the testator, it is personal property; and taking the principle laid down in the case of Ewin, it must be considered as property within the domicile of the testator in Demerara; and it is admitted, that if it was property within the domicile of the testator in Demerara, it cannot be subject to legacy duty. Now, my Lords, that is the principle upon which this case is decided; the only distinction is that to which I have referred, and which distinction is decided by the case In re Ewin, to which the learned Chief Justice has referred.

Now, my Lords, that being the case, and the principle upon which I think this question should be decided, I was desirous of knowing what were the grounds of the judgment of the Court below. I find that the judgment was delivered by two, or rather that the case was heard by two, very learned Judges, Lord Gillies and Lord Fullerton. The judgment was delivered by the late Lord Gillies. I was anxious, therefore, from the respect which I entertain for those very learned persons, to know what were the grounds upon which their judgment was rested.

The first case to which they referred, for it was principally decided upon authority, was a case decided before Sir Samuel Shepherd, Chief Baron of Scotland. That case in the judgment

was very shortly stated; and I am very happy that the Solicitor General gave us the particulars of that case; for it appears that the legacy was charged upon real estate, and therefore it would not come within the principle which I have stated, and there might therefore have been a sufficient ground for the decision in that case. It is sufficient to say that it does not apply to the case which is now before your Lordships' House.

Then the next case which was referred to was the case of The Attorney General *v.* Dunn; but, my Lords, that could hardly be cited as an authority. It is true the point was argued, but it was not necessary for the decision of the case; and no decision, in fact, was given upon the point. The Chief Baron expressly reserved his opinion, and said, that he should not express what his opinion was. Also the learned Judge near me, Mr. Baron Parke, expressed the same thing. It is true that one of the learned Judges said, that at that moment, according to the impression upon his mind, he rather thought the duty would be chargeable: he expressed himself in those terms according to his immediate impression, but no decision was given upon the point; it was a mere *obiter dictum;* and surely such a *dictum* as that ought not to be cited as the foundation of a judgment of this description. Looking at the authorities, therefore, they appear to me not properly to support the judgment of the Court below.

The third authority was that of my Lord Cottenham. Now my Lord Cottenham, in the case of Arnold *v.* Arnold, expressly states in terms that the two cases, The Attorney General *v.* Cockerell, and the Attorney General *v.* Beatson, he considered to have been overruled. He states that in precise terms. A particular passage is selected from the judgment of my Lord Cottenham to support the opinion of the learned Judges in the Court below; but I am quite sure, when that passage is read in connection with the whole judgment of that very learned person, every person reading it with attention must be satisfied, that the inference drawn from that particular passage that was cited is not consistent with the whole tenor of the judgment.

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It appears to me, therefore, that none of the authorities which were cited by the Court below sustained the judgment; and I am of opinion, therefore, independently of the great respect which I entertain for the judgment of the learned Judges who have assisted us upon this occasion, that upon the true construction of the Act of Parliament, and applying the known principles of the law to that construction, the legacy duty is not in a case of this description chargeable. I shall move, therefore, with your Lordships' consent, that the judgment in this case be reversed.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the view which he takes of the construction of this statute, and of the authorities and of the argument, endeavouring to differ this case from the Attorney General *v.* Jackson, which must be taken with the matter of Ewin, also in the Exchequer. I so entirely agree upon all those three heads with my noble and learned friend, that I do not think it necessary for me to do more than generally to express my concurrence.

I wish also to add, that my recollection coincides perfectly with his as to the reasons for troubling the learned Judges to attend in this case. It was not only that it was a Scotch case from the Scotch Exchequer, but it was a case which must impose a construction upon the general Legacy Act applicable to England and the British colonies, and other foreign colonies, as well as in this case arising in Scotland, and therefore we considered that it was highly expedient to have a general consideration of the case and the assistance of the learned Judges. But we also felt this, which I am sure the recollection of my noble and learned friend will bear me out in adding, and which the recollection of my noble and learned friend near me, who was also present at the former argument, has entirely confirmed, namely, that we considered this to be a case in which there was a conflict of decisions, a conflict of authorities, which made it highly expedient that it should be settled after the fullest and most mature

deliberation, with the valuable assistance of the learned Judges; for there was the authority of the Attorney General *v.* Jackson in the Exchequer, and afterwards before me in Chancery, and ultimately before your Lordships in this House by appeal on a writ of error; there was that authority on the one hand, with the decision of the Exchequer not appealed against in the matter of Ewin, on the other hand; and the authority of those decisions appeared to be in some discrepancy at least—more, perhaps, real than apparent—with the two former cases of the Attorney General *v.* Beatson and the Attorney General *v.* Cockerell (I think those are the names of the two cases). It became therefore highly expedient that we should maturely weigh the whole matter before we held that that decision of the House of Lords, in the Attorney General *v.* Jackson, had completely overruled those other cases; the rather because certainly words were used in disposing of the Attorney General *v.* Jackson, which seemed to intimate the possibility of those former cases standing together with the latter cases. Upon full consideration, however, I am clearly of opinion, with my Lord Cottenham, who expressed that opinion, as it has been stated by my noble and learned friend, very strongly in the case of Arnold *v.* Arnold, that those two cases of the Attorney General and Cockerell, and the Attorney General and Beatson, cannot stand with the case of the Attorney General *v.* Jackson. Then, my Lords, the Attorney General *v.* Jackson must be considered, not merely by itself as regards its bearing upon the facts of the present case, but it must be taken into consideration, coupled with the case of *The matter* of Ewin, because otherwise ground might be supposed to exist for differing the two cases, inasmuch as it might be, and has been contended, and ably contended at the Bar, that part of the funds were locally situated in this country. But, then, take the matter of Ewin, and your Lordships must perceive at once, as my noble and learned friend has done, and as the learned Judges have done, that those two cases together in fact exhaust the present case; because, what

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was wanting in the Attorney General *v.* Jackson is supplied by the decision in the matter of Ewin. I will not say supplied in terms, but what comes to the same thing, in the argument upon the construction of the statute, in the legal application of the principle, the converse was decided. Here it is a case of money or property brought over here, and administered here, the domicile of the testator or intestate being abroad out of the jurisdiction. There in the matter of Ewin it was the converse—an administration by a person domiciled here, and a testator or intestate domiciled here, and the funds locally situate abroad; it is perfectly clear that no difference can be made in consequence of that, because the principle of *mobilia sequuntur personam*, as regards their distribution and their coming or not within the scope of this revenue Act, must be taken to apply to the two cases; and the rule of law, indeed, is quite general, that in such cases the domicile governs the personal property; not the real, but the personal property is in contemplation of the law, whatever may be the fact with regard to the domicile of the testator or intestate.

I entirely agree with my noble and learned friend in the views which he has taken of the grounds of the decision of the Court below; whether that decision was before or subsequent to the decision in the case of the Attorney General *v.* Jackson, and the matter of Ewin I am not informed.

[LORD CHANCELLOR.—It was subsequent.]

LORD BROUGHAM.—Then their Lordships ought clearly to have taken it into account, and more especially if they had the light thrown upon the subject by Arnold *v.* Arnold.

[LORD CHANCELLOR.—They cite Arnold *v.* Arnold.]

LORD BROUGHAM.—That makes it still more clear that the foundation of their decision was unsound. It is to be taken into account that Lord Cottenham does not give his opinion in Arnold *v.* Arnold, merely upon the authority of the Attorney General *v.* Jackson, because he expressly says, and very candidly and fairly says, doing justice to the grounds of the decision of your Lord-

ships in this House, that independently of authorities, he is of the same opinion, and should have come to the same opinion as we did in the Attorney General v. Jackson, notwithstanding the conflict of other cases. We have therefore the clearest reason for saying, that if my noble and learned friend had not been unfortunately absent to-day, he would have concurred entirely in this view of the case.

Upon the whole, therefore, I entirely concur in the opinion of my noble and learned friend, and acknowledge fully and with thanks the assistance which we have derived from the learned Judges, giving the reason which I have given for our wishing to have their attendance, rather than from any great doubt or difficulty which we felt the case to be encumbered by; and, therefore, my Lords, I second my noble and learned friend's motion, that judgment be given for the plaintiff in error.

LORD CAMPBELL.—My Lords, I confess in this case I did entertain very considerable doubts, and I was exceedingly anxious that your Lordships should have the assistance of my Lords the Queen's Judges in a case that admitted of great doubt, as it seemed to me, and where the decisions were directly at variance with each other. Having heard the opinion of the learned Judges, it gives me extreme satisfaction to say that I entirely concur in it, and that the doubts which I before entertained are now entirely removed. Having heard the opinion of the learned Judges, I defer to it with the greatest respect, as I certainly could not have done if it had not satisfied my mind; in that case of course I should have found it my duty to act upon the result of my own judgment. But with the assistance of the learned Judges under the present circumstances I am removed from anything of that sort, because I agree with the learned Judges in the result at which they have arrived, and the reasons which they have assigned for the opinion they have given to your Lordships.

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At the same time, my Lords, I believe that if the Chancellor of the Exchequer, who introduced this bill into Parliament, had been asked his opinion, he would have been a good deal surprised if he had heard that he was not to have his legacy duty on such a fund as this, where the testator was a British-born subject, and had been domiciled in Great Britain, and had merely acquired a foreign domicile, and had left property that actually was in England or in Scotland at the time of his decease. The truth is, my Lords, that the doctrine of domicile has sprung up in this country very recently, and that neither the Legislature nor the Judges, until within a few years, thought much of it; but now it is a very convenient doctrine—it is now well understood, and I think that it solves the difficulty with which this case was surrounded. The doctrine of domicile was certainly not at all regarded in the case of the Attorney General *v.* Cockerell, or the case of the Attorney General *v.* Beatson; if it had been the criterion of that time, *cadet questio*, there would have been no difficulty at all in determining this question; but now, my Lords, when we do understand this doctrine better than it was understood formerly, I think that it gives a clue which will help us to a right solution of this question.

It is impossible that the words of the statute can be received without limitation; at once foreigners must be excluded. Then the question is, what limitation is to be put upon them, and I think the just limitation is the property of persons who die domiciled in Great Britain; on such property alone I think can it be supposed that the Legislature intended to impose this tax. If a testator has died out of Great Britain with a domicile abroad, although he may have property that is in Great Britain at the time of his death, in contemplation of law that property is supposed to be situate where he was domiciled, and therefore does not come within the Act. This seems to me to be the most reasonable construction to be put upon the Act of Parliament—it is the most convenient—any other construction would lead to

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very great difficulties; and I think the rule which is laid down by the learned Judges may now be safely acted upon, and will prevent any doubts arising hereafter. But I think that this caution should be introduced, that this applies only to legacy duty, not to probate duty, because with regard to probate duty it is not as I understand at all the opinion of the learned Judges. With respect to the probate duty, if it is necessary to take out the probate, the property being in Britain, for the purpose of that probate duty, the property would still be considered as situate in Great Britain, and the probate duty would attach. All the cases respecting probate duty are considered untouched; but with respect to the legacy duty, those two cases, the Attorney General *v.* Cockerell, and the Attorney General *v.* Beatson, must be considered as completely overturned; and domicile with respect to legacy duty is hereafter to be the rule.

LORD CHANCELLOR.—There is no question as regards the probate duty. It cannot be supposed for a moment that this affects the probate duty.

Ordered and adjudged, That the judgments given in the said Court of Exchequer in Scotland for the defendant in error be reversed.

J. TIMMS—LAW and ANTON, Agents.

[21 *February*, 1845.]

THE RIGHT HONBLE. HENRY DAVID EARL OF BUCHAN, *Appellant.*

THE HONBLE. DAVID STUART ERSKINE, *Respondent.*

*Tailzie—Resolutive Clause.*—A clause in an entail immediately following the prohibitions, and declaring that if any of the heirs should, "in any time coming, failzie herein, or do any thing contrair to this "my destination and provision," the person "swa failzeing and "doing on the contrair hereof," should lose his right, *held* effectual to resolve any act done contrary to the prohibitions of the entail.

*Ibid.—Irritant Clause.*—A clause declaring "all dispositions and other "deeds done contrair to the said provision and destination," to be null, *held* effectual to irritate acts done in contravention of the general prohibitions.

*Ibid.*—A general reference in the procuratory of resignation and precept of sasine of a bond of tailzie, to "the reservations, reversion, pro-"visions, and conditions above mentioned," *held* to be a sufficient compliance with the Act 1685, without the necessity for a repetition of the fetters of the entail.

SIR JAMES STUART, by deed bearing date the 4th of November, 1664, executed a bond obliging himself, his heirs, &c., to execute an entail of his lands of Strathbrock. This bond contained the following prohibitions: "And it shall noways be "leisum nor lawfull to any of the heirs of tailzie and provision "above specified, (except only the saids William Stewart my son, "and the heirs-male lawfully to be procreat of his own bodie, "and the heirs-male lawfully procreat or to be procreat of my "own bodie,) to sell, dispone, or wadsett the lands, barronie, and "others above-written, or any part thereof, or any annual-rents "or yearly duties to be uplifted furth of the samen, or to sett "tacks thereof for longer space than their own lifetimes, or to "contract debt for which the samen may be apprysed or adjudged, "or to do any other fact or deed in prejudice of the said tailzie, "and of the persons above-named and their forsaids."

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These prohibitions were fenced by the following clauses:— "And if my saids daughters and their heirs, or any others the "heirs of tailzie and provision above specified, (except the said "William Stewart my son, and the heirs-male lawfully to be "procreat of his own, and the saids heirs male lawfully procreat "or to be procreat of my own body,) shall in any time comeing "failzie herein, or do any thing contrair to this my destination "and appointment, then, and in that case, the person or persons "swa failzieing and doing in the contrair hereof, and the heirs of "their bodies, shall amitt and lose their right and haill benefite "of this present bond of provision and infeftments following "hereon, and of the haill lands, barronie, and others above-"written, and the samen shall in all time thereafter pertain, "belong, and accress to the next person for the time who be "vertue of the said tailzie and provision would have succeeded "to the said lands and estate, failzieing the said persons, contra-"veeners, and the heirs of their bodies; and all *dispositions* and "*other deeds* whatsomever, made or done contrair to the said "provision and destination, with all that shall follow yron, shall "be *ipso facto* voyd and null, without any declarator, and shall "nowayes affect nor burden the saids lands, barronie, and oyrs "above written, or any part thereof, as if the samen had never "been done, with, under, and upon the whilks reservations, "reversion, provisions, and conditions respectively above men-"tioned, I have made and granted thir presents and no other-"wayes."

The bond then contained a procuratory for resignation, which began where the clauses above quoted left off, and set out in these terms: "And with, under, and upon the same "reservations, reversion, provisions, and conditions, I have made, "constitute, and ordained." It then contained the usual terms of a procuratory for giving infeftment to the series of heirs named; and continued thus: "With, under, and upon the re-"servations, reversion, provisions, and conditions above-men-

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" tioned, and no otherwayes, which are holden as repeated in this " present procuratorie, and are appointed to be contained and " sett down in the instruments of resignation, and in the charters " and infeftments to follow hereupon." The bond also contained a precept of seisin, directing infeftment to be given, " with, " under, and upon the reservations, reversion, provisions, and " conditions rexive above mentioned, which are all holden as " repeated herein, and are appointed to be contained and sett " doun in the instrument of sasine to follow hereon."

The appellant being considerably in debt, brought an action against the substitute heirs of entail, to have it declared that he had all the rights of a proprietor in fee simple; 1st, Because the bond of tailzie did not contain any irritant clause voiding sales, conveyances, tacks by the heirs, or real diligence upon debts contracted by them. 2nd, Because the bond did not contain any clause resolving the rights of heirs selling, or alienating, or in any way affecting the lands. 3rd, Because the fetters of the entail were not repeated, either in the procuratory of resignation or the precept of seisin.

The respondent, the son of the appellant, and the first heir entitled to take after him under the entail, appeared and put in defences to the action. Mutual cases for the parties were ordered. On advising these, the Lord Ordinary did not himself pronounce any interlocutor; but reported the case to the Inner House, accompanied by the following Note:

" This question is taken to report as it is prepared for judg- " ment by elaborate cases on both sides, which are printed, and " ready for the consideration of the Court; and both parties ex- " pressed a desire to obtain a judgment with as little delay as " possible.

" The question relates to the validity of the entail of the " estate of *Strathbrock*, which has been for some time an inheri- " tance in the family of the noble pursuer; and it is one of the " many cases now raised on exceptions taken to the phraseology

" and efficacy of the statutory clauses. These are objected to on " grounds which the Lord Ordinary has not been able to satisfy " himself can be sustained, without giving a greater effect to a " verbal and hypercritical construction than the Court has ever " yet admitted in any preceding cause.

" The entail is said to be defective in the *resolutive* and *irri-* " *tant* clauses, each of which, therefore, requires to be carefully " examined.

" 1. The *resolutive* clause follows the prohibitory, and it is a " fundamental point of the case, deserving notice, that the *pro-* " *hibitory* clauses are *admitted* to be complete, embracing the " three heads of prohibition authorised by the Act 1685.

" It is next important to remark, that the resolutive and " irritant clauses, in point of collocation in the present deed, " *immediately follow the prohibitions;* after an enunciation of the " prohibitions, the resolutive clause proceeds thus:—' And if my " ' said daughters and their heirs, or any other the heirs of tailzie, " ' &c. &c., shall in any time coming *failzie herein*, or do any " ' thing contrary to this my destination and appointment, then " ' and in that case the person or persons swa failzieing, and " ' *doing on the contrary hereof*, shall amit and lose their right,' " &c., &c.

" And the irritant clause declares, that ' all *dispositions and* " ' *other deeds* whatsomever made or done contrair to the said " ' provision and destination, with all that shall follow thereon, " ' shall be *ipso facto* void and null.'

" With regard to the first of these clauses (the resolutive), " the Lord Ordinary is of opinion that it must be held as a " *general* and not as an *enumerative* clause. It bears a reference " to the whole of the preceding part of the deed; and the pro- " vision as to any of the heirs ' who shall *failzie herein*,' seems " alike comprehensive and unqualified, as well as the declaration " that ' the persons swa failzieing and doing *in the contrary* " ' *hereof* shall amit and lose the right,' &c.

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" This provision hardly admits of any other construction than " this, that if any heir ' shall failzie herein, by acting contrary " ' to any part of the preceding deed,' or if they shall fail ' to " ' observe the conditions and limitations imposed on them,' they " should amit and lose their right, &c., &c. These exegetical " words, it is well known, are used in many tailzies. But when " the clause is directed in short and unqualified terms against all " who '*failzie herein*,' it is equally effectual, as it applies to all " failures of whatever kind they may be, contrary to any con- " ditions of the tailzie.

" No doubt the resolutive clause also contains the alternative " words applicable not only to the heirs who shall ' failzie " ' herein,' but also who ' shall do any thing contrary to this *my* " ' *destination* and *appointment*,' but it is not thought that these " words can be held, on any fair construction, as qualifying the " general term which precedes it. The reference to '*my desti-* " ' *nation and appointment*' cannot be viewed as applying to the " clause of destination only, as, even in the strictest construction, " the word ' appointment,' which is also used, is a peculiar and " generic term, referring to the constitution or appointment of " heirs *under all the preceding provisions and conditions of the* " *settlement*. Suppose it had been declared, that the heirs who " shall do any thing contrair ' to my *settlement* hereby made,' " should forfeit their right, &c., that provision would certainly " have been sufficiently explicit to embrace the whole of the " preceding clauses of the deed; but the Lord Ordinary has not " been able to satisfy himself that the term '*appointment*' is not " as effectual and comprehensive as '*settlement*.' More especially " ought that construction to be adopted when the preceding " words are taken into view, which apply, without exception or " limitation, to all '*who shall failzie herein*.'

" 2. The objection to the *irritant* clause is different, but it " depends much on the right construction which is due to the " resolutive clause. The irritant follows the resolutive clause,

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"and it provides, that 'all dispositions and other deeds what-
"'somever, made or done contrair to the said *provision* and
"'*destination*, with all that shall follow thereon, shall be *ipso*
"'*facto* void and null,' &c., &c.

"The objection to this clause seems to be founded on the
"plea which was sustained against an entail in the case of
"Speid (21st February, 1837), in which an irritant clause,
"directed against all who should 'act and do in the contrary of
"'the *provision* above set forth,' (thus using the term in the
"*singular* number), was held void for uncertainty, as it was not
"made perfectly clear to *which* of the foregoing provisions it
"applied.

"Without impeaching the authority of Speid's case, (which
"was not an unanimous decision, and was not carried to appeal,)
"it appears to the Lord Ordinary that the very strict rule of
"construction there adopted cannot be extended to any other
"entail where there is any essential difference in the structure
"of the deed from that on which the question arose in Speid's
"case. The Lord Ordinary views the present as an entirely
"different deed. In Speid's case, the irritant clause *followed the*
"*prohibitory*, and *preceded* the resolutive; and certainly when
"there were a great variety of provisions, and when it was
"declared in the next sentence that any who acted contrary to
"the provision above set forth only—there was room for arguing
"that the maker had not pointed out with precision *which* of
"the provisions he intended to irritate.

"But the present is a very different case. Here the irritant
"clause immediately *follows the resolutive*, and, like that clause,
"it is general and not specific. And the argument sustained in
"Speid's case is inapplicable here, because, although the word
"'provision' is used in the singular number, it refers, from its
"collocation and grammatical construction, to the general pro-
"vision in the resolutive clause immediately preceding, which

" was a general provision restricting the right of all heirs who " should 'failzie herein.' In short, the irritant clause just irri- " tates all the deeds of the heirs whose rights shall fall within " the forfeiture of the resolutive clause,—and that is sufficiently " broad to apply to every act and deed at variance with the " entail.

" Besides, in this particular tailzie, and in the resolutive and " irritant clauses themselves, the term provision is evidently " used in a *generic* sense. Thus, in the resolutive clause, the " deed of tailzie is referred to as 'this present bond of *provision*,' " and, in the same sentence, it is declared that the estate, in case " of contravention, shall pertain to 'the next person for the time " ' who, be vertue of the said tailzie and *provision*, would have " ' succeeded to the said lands,' &c. Hence, when it is further " declared in the irritant clause, that 'all dispositions made and " 'done contrair to the said *provision* and *destination*' shall be " void and null, it seems clear, from the use of the term in the " *immediately preceding sentence*, that the maker of the deed " used the term 'provision' as synonymous with 'tailzie.' This " is not a matter of remote inference. Any other interpretation " of the term would, it is thought, be contrary to the plain and " unmistakeable import of the deed.

" If these views of the leading pleas in this declarator be " correct, it is unnecessary to enter into the other questions " discussed in the revised cases. But if the Court shall be of " opinion that the entail is ineffectual from any defect in the " resolutive or irritant clauses, then the extent of the heir's " powers to make gratuitous alienations will fall to be considered. " As the Lord Ordinary has called the attention of the Court to " this subject in sundry recent cases, particularly in those of " Eglinton, Polmaise, and Duthie, it is sufficient to suggest that " these cases should be kept in view in deciding the present.

" J. C."

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The Inner House ordered the opinions of the other Judges to be taken, and these were delivered in the following terms:

"We agree in the opinion expressed by the Lord Ordinary. "The entail prohibits selling, disponing, contracting debt, '*or to* "'*do any other fact or deed in prejudice of the said tailzie, or of* "'*the persons above named.*' The resolutive clause is imme- "diately connected with the prohibitory clause, and provides, "that if the heirs shall '*failzie herein, or do anything contrair* "'*to this my destination and appointment,*' their right shall be "resolved. This is not ambiguous. It provides for the heirs "either failing in what the deed enjoins, or acting in opposition "to what the granter had appointed by it. The irritant clause "is connected with the resolutive, and declares that '*all disposi-* "'*tions, and other deeds whatsomever, made or done contrair to* "'*the said provision and destination,*' &c., shall be void and "null. The terms here used, 'SAID *provision and destination,*' "are as comprehensive as those of destination and appointment, "and comprehend the whole entail. This case is therefore "materially different from that of Speid (21st February, 1837, "15 *Shaw*, 618). There the deed contained complex clauses, "which formed distinct and substantive provisions in the entail, "and the irritant clause was so framed that it could only apply "to one of them, but the deed left it altogether uncertain to "which particular provision it applied. Here the deed, although "made before the Act 1685 was passed, has been framed with "greater clearness, and is much in accordance with the language "and enactments of that statute which sanctions tailzies 'with "'irritant and resolutive clauses, whereby it shall not be lawful "'to the heirs of tailzie to sell, annailzie, or dispone the saids "'lands, or any part thereof, or contract debt, or do any other "'deed whereby the samyn may be apprysed, adjudged, or "'evicted from the other substitute in the tailzie, or the suc- "'cession frustrate or interrupted, declaring all such DEEDS to

" ' be in themselves null and void,' &c. The statute was pro-
" bably framed having that or some similar deed in view.

" JOHN A. MURRAY.
" J. CUNINGHAME.
" H. COCKBURN.
" J. W. MONCREIFF.
" A. MACONOCHIE.
" J. H. FORBES.
" F. JEFFREY."

" I am on the whole inclined to think that this is a good
" entail. The only point, indeed, on which I entertained a
" doubt, was whether the irritant clause was sufficiently ex-
" pressed to reach the *contraction of debt.* And upon that head,
" though my scruple has finally given way, I cannot help still
" thinking that the case is a very narrow one.

" Looking, however, to the whole context, and observing—
" (1.) That the prohibitory clause classifies, as it were, the ' con-
" ' tracting debt,' under the same general category with those
" *non-enumerated* cases of contravention, which it describes as
" the ' DOING *any* OTHER *fact or* DEED in ' prejudice of the said
" ' tailzie ;' and (2.) that the resolutive clause strikes at the
" contraction of debt (as well as the other matters prohibited)
" under such general words as ' failzie herein, or DO *any thing*
" ' *contrair* to this my destination and appointment :' or again,
" ' failzieing and DOING *in the contrary* hereof;'—I have finally
" come, though still not without hesitation, to hold, that the
" irritant clause, in declaring that ' all dispositions and other
" ' DEEDS *whatsomever made or* DONE *contrair to the said provision*
" ' *and destination* shall be void and null, and shall noways *affect*
" ' nor *burden* the said lands,' is sufficient to meet the case of
" *debt*,—as a ' DEED in prejudice of the said tailzie,' under the
" terminology of the *prohibitory* clause :—as a ' *thing* DONE *con-*

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" '*trair* to this my destination and appointment,' or 'DONE *in* " '*the contrair* hereof' under the terminology of the *resolutive* " clause:—and finally, under the terminology of the *irritant* " clause itself, as 'a DEED *whatsumever* DONE *contrair to the said* " '*provision and destination*,' and calculated to '*affect* and *burden* " 'the lands;'—and that, on the whole matter, the words '*other* " 'deeds whatsomever,' as they occur in the irritant clause, are " *not* to be construed in the mere limited sense of deeds *ejusdem* " *generis* with the '*dispositions*' mentioned in a preceding portion " of the clause,—that is to say, as deeds in the technical sense of " *written instruments*, in contradistinction to the more natural " sense of ACTS or DOINGS of the party.

" The words, 'the said *provision and destination*' as they " occur in the irritant clause, I hold with Lord Murray to be " synonymous with the words 'this present *bond of provision*'— " or 'this my *destination and appointment*'—or 'the said *tailzie* " '*and provision*'—or simply the said '*tailzie*,'—all of which " expressions occur in close juxtaposition in this part of the deed; " and therefore it follows, that the words 'deeds whatsumever " 'done contrair to the said provision and destination' are not " to be confined merely to deeds done in alteration or prejudice " of the destination or order of succession, but embrace *debts* as " one of the forms of 'deeds done' generally as a contravention " of the entail.

" I may just add—1. That even were the entail to be held " defective, as regards the *contraction of debt*, I can see no ground " whatever for sustaining the conclusions of the libel in any other " respect. But 2. I have great doubt, whether, in any view of " the case, the present pursuer would be entitled to succeed in " this action. The ground of action, as he has laid it in the " summons, raises a question exclusively *inter hæredes*. It is " not set forth that any *sale* of the estate has been attempted, " or that *debt* has been contracted, or that a *gratuitous alienation* " has been executed, or that anything has been done to affect or

" alter the *order of succession.* The fact may or may not be, " that some of those things have been done, but the summons " does not raise the point; and there is here accordingly no " question with any *third party*, whether as *creditor* or other- " wise. Now there can be no doubt that the entail, *under the* " *prohibitory clause alone*, is effectual at all events *inter hæredes.* " And to borrow the words of Lord Moncreiff's opinion in the " case of *Aboyne*, (now also before the Consulted Judges,) 'it is " 'a mistake to say, that if there be an effectual entail *inter* " '*hæredes*, the Court will try a question concerning the possi- " 'bility of a valid sale, &c., being made, *where no sale, &c., has* " '*been attempted.* They have repeatedly refused to do so.'

" J. IVORY."

The Inner House unanimously concurred in these opinions, and pronounced, on 23rd June, 1842, an interlocutor dismissing the action, vide 4 *B. M.* & *D.* The appeal was against this interlocutor.

*Mr. Kelly* and *Mr. Anderson* for the Appellant.—I. The resolutive clause does not in any way refer to the prohibitions, which is necessary, in order to make it effectual. It is not sufficient that there is a general reference to the general intention of the entailer, as by the words " this my destination and appointment," there must be a specific reference to the prohibitions *qua* such. Destination is a word having a known technical signification applicable to the series or class of heirs called. If this word alone had been in the clause, it might have resolved any act altering the order of succession, but it could not have gone beyond, and that it should have such limited effect is consistent with the structure of the deed, as the prohibition against altering the order of succession immediately precedes the resolutive clause. This construction received countenance in Rowe *v.* Monypenny, 15 *Sh.*, 500, and in Monypenny *v.* Campbell, *Sh.* & *Mc.*, 898. If

the clause with the word "destination" alone would not be effectual, it is not mended by the word "appointment," which is not known to the law, and has no fixed meaning, and would seem, in the present instance, not to be more than an expletive of "destination," as any key to its meaning is to be found in the use of the verb appoint in the other parts of the deed, where it is employed in regard to the course of succession.

II. In the irritant clause, which follows the resolutive and begins at the words, "and all dispositions and other deeds," these words regulate and ride over the whole sentence. In their signification they are limited to written instruments, and cannot embrace the contracting of debt or adjudications following upon it. In the next branch of the sentence the irritancy is confined "to the said provision and destination," each in the singular number. The clause is open to the same objection as the resolutive clause, and to this further one, that as there are many provisions in the deed, and no one in particular is referred to, it does not appear which is embraced, and it cannot be held to include the whole provisions of the deed, as it would in that case embrace a direction to the heirs to wear particular arms, and to make the not doing such an act void and null would be an absurdity. Every observation which was made in Speid *v.* Speid, 15 *Sh.* 618, is applicable here.

III. The entail is further void, because the fetters are not inserted either in the procuratory of resignation or the precept of sasine. This is explicitly required by the Statute 1685, and no equivalent can be supplied. If the reference to the fettering clauses in the procuratory and precept will supply the defect of *verbatim* insertion, the statute would be equally complied with by the use of separate deeds. This objection is in the present instance especially forcible, as the entail is in the form not of a disposition, but of a bond, so that the procuratory is what operates the feudal conveyance, and the charter which is expede

upon it, will recite it alone. So that in the register of sasines there will be a reference merely to the clauses, and not the clauses themselves. But further, the reference is to the "reservations, reversion, provisions, and conditions above mentioned;" but none of these terms embrace either the resolutive or the irritant clause, which are not provisions or conditions of the entail, but clauses which fence and make effectual the conditions and provisions.

LORD COTTENHAM.—My Lords, in this case, without hearing the counsel for the respondent, I entirely agree in the judgment of the Court below, and shall therefore move your Lordships to affirm that judgment.

The question entirely turns upon the words "destination and "appointment" in the part of the deed of entail, which I will read to your Lordships:—"And if my said daughters and their heirs, "or any others, the heirs of tailzie and provision above specified, "(except the said William Stewart, my son, and the heirs male "lawfully to be procreate of his own and the said heirs male "lawfully procreat or to be procreat of my own body,) shall, in "any time coming, failzie herein, or do anything contrair to this "my *destination and appointment*, then and in that case the "person or persons so failzieing and doing in the contrair hereof, "and the heirs of their bodies, shall amitt and lose their right "and haill benefite of this present bond of provision and infeftment "following hereon." I consider that by the words "destination "and appointment," the entailer must have meant what he had before laid down, or "the whole scheme," and that the term "provision" he must have used in the same way, to apply to the whole scheme.

Then, my Lords, that which he provides against is not confined to instruments in writing, but the terms are, "any act or "deed," terms which are quite inconsistent with the author of this instrument meaning to describe written instruments only.

The words could have no application under any such meaning, comprehending as they do everything which before had been enumerated, whether instruments executed or acts done. Upon those clauses, therefore, with regard to the construction I put upon those words, I think the judgment of the Court below is correct.

Then, another objection of a totally different character arises, from the procuratory of resignation and the precept of sasine. It is said that, by the terms of the Act, they ought to comprise all the clauses which are required to be inserted in the entail itself, the words of the Act being, that it is declared "that such tailzies shall "only be allowed in which the foresaid irritant and resolutive "clauses are insert in the procuratories of resignation, charters, "precepts, and instruments of seasin." Now, it cannot be disputed, after the authorities to be found in the books, that where there is one deed comprising the procuratory and precept, and in that same deed those clauses are to be found, it is sufficient if in each particular deed a reference is made to the other parts of the deed in which the clauses are contained. The terms in which that is laid down, are very clear in that case which has been referred to, the case of the Executors Creditors of Murray Kynnynmound, 5th July, 1744. "Although the Act 1685 declares, that such "tailzies shall only be allowed in which the irritant and resolu-"tive clauses are insert in the procuratories of resignation, "charter, precept and instrument of sasine, yet this has not "been so understood, that where the procuratory of resignation "and precept of sasine are *in eodem corpore*, the several irritant "and resolutive clauses must be repeated in each. For by an "equitable construction, all the clauses in the same deed are un-"derstood to be inserted in every part of the deed; and there-"fore, where the irritant and resolutive clauses are inserted in "the procuratory, it is enough that in the precept thereto sub-"joined they be referred to, for in that case the precept of "sasine is the whole deed.

Now, that being the general rule, we have here the procuratory of resignation and the precept of sasine as part of an instrument in which those clauses are to be found. That falls exactly within the rule laid down in that case, and no authority has been referred to in which the rule so laid down appears to have been departed from.

My Lords, then an objection of a totally different character has been suggested, namely, that the register of sasines might not, (not that it does not, because of that fact there is no suggestion, but that it might not,) under the provisions of this deed, contain those clauses. The answer to that is that that is not the objection. The objection is not that there has been any omission to do what ought to have been done, and that that will affect therefore the register of sasines. Beyond all doubt, if the provisions of the instrument be attended to, no such omission can possibly be there found, because this direction has a perfectly distinct object, upon the construction of which I shall presently say a word. The words are, "With, under, and upon the reserva-"tions, reversion, provisions, and conditions above mentioned, "and no otherwayes, which are holden as repeated in this present "procuratory, and are appointed to be contained and set down in "the instruments of resignation, and in the charters and infeft-"ments to follow hereupon, acts, instruments, and documents "needful thereupon," and so on. So that there is an express direction that the officer is to prepare those several instruments, for which this deed contains the authority, provided the construction of this clause be such as I think it is, and that they shall contain a recital of those several clauses. Suppose that direction to have been followed, the register of sasines would contain all those clauses.

Then it is said, that the terms here do not include those clauses—that the word "clauses" is not used, and that the words "reservation, reversion, provisions, and conditions," do not comprise them. Now, my Lords, first of all, I think they are quite

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large enough to comprise them. If I am right in the construction which before I put upon the word "provisions," it is obvious that it is large enough to comprise them: the words are, "provisions "and conditions," so that this point necessarily follows the result of the opinion which I have before expressed. Therefore, as regards all the points which have been urged as impeaching the judgment of the Court below, I think they are unsustained.

LORD BROUGHAM.—My Lords, I take entirely the same view of this case with my noble and learned friend. There are three objections raised: first, that the resolutive clause is insufficient; secondly, that the irritant clause is insufficient; and thirdly, that there is not a sufficient incorporation of the prohibitory and resolutive and irritant clauses in the precept of sasine to which we are now confined; for we are confined strictly, and that must always be kept in view, to the validity or invalidity of the deed at the time when it was made, namely, in the year 1664. What was to happen afterwards, by accident might have happened the year after, although it did not happen till fourscore years afterwards. The time when it was put upon the record we have nothing to do with: we are upon the validity of this deed at the time when it was made.

Upon the first point, my Lords, I think the words are large enough, both in the irritant and resolutive clauses. The words in the prohibitory clause are, "doing any other fact or deed in "prejudice of the said tailzie, and of the persons above named "and their foresaids;" and the resolutive, "and if my said daugh- "ters and their heirs, or any others the heirs of tailzie and pro- "vision above specified, except," and so forth, "shall in any time "coming failzie herein, or do any thing contrair to this my desti- "nation and appointment, then and in that case the person or per- "sons so failzieing and doing in the contrair hereof," (it is doing as well as failing,) "shall amitt and lose their right," that is to say, their right shall be resolved in favour of the next taker under

the destination. Those words are large enough certainly to cover every matter in question; because it is not only "destination," but it is "destination and appointment." And also, "if any "person shall in any time coming fail herein." Now suppose we put that aside, because "fail herein" may be said to apply rather to non-feasance than mis-feasance,—to not doing an act which he had a direction to do, failing to do a thing which he had directed to be done; and I do not think the case referred to for the respondents mends that. But that is not all. I think that by itself might not be sufficient; but we are here dealing with what follows: "and doing in the contrair hereof." That is as large an expression as can be used of an act of contravention—"the contrair hereof." Of what? The contrair of this prohibition. You do not do in the contrary of something that is not prohibited, but it is, that you do something in the contrary of what has been laid down; that is to say, you violate the preceding prohibition,—the preceding prohibition being valid to effect the object aimed at by it.

My Lords, I need not go into the question upon the difference between the words "made" and "done," because clearly there is something very different in their meaning. A "deed made" may no doubt mean an "instrument made," but a "deed done" is not an "instrument done,"—it is an "act done;" and, therefore, these words, "made and done," apply to acts as well as deeds. So much for the resolutive clause.

The next point is upon the irritant clause, "and all disposi- "tions and other deeds whatsoever made or done," to which the observation I have just made applies. I thought at the moment it had been in the resolutive clause. It is in the irritant clause, "made or done contrair to the said provision and destination, "with all that shall follow hereon." These are very large words. "Provision" is the whole instrument,—it is the whole prohibitions, partly fenced with the resolutive clause; it is the whole of the provisions herein laid down to fetter the successive heirs of

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entail, "and all dispositions and other deeds whatsomever made "or done contrair to the said provision and destination." To be sure it is in the singular, but it is "the said provision." It cannot mean any one provision, for it is not pointed out which of the different provisions is meant. But when you give a deed of arrangement of a family estate and its succession, and the fetters under which it shall be demised successively from one heir of entail to another upon his demise or forfeiture; when having given that you afterwards say, "This provision which I have "made," you surely do not mean to single out any one of those provisions which you have made before; but you mean to describe, by reference to what you have done, the whole of your family arrangement, and to prescribe the rules under which the successive heirs shall take the estate in question.

I forgot to make an observation upon the word "appoint- "ment," which comes, I believe, in the first clause, the resolutive clause, and is not in the irritant clause. That word "ap- "pointment" appears to me to be an exceedingly general word, and to enlarge the sense of the preceding word "destination." It is clearly something different from "destination;" for it says, shall "do anything contrair to this my destination and appoint- "ment." If I merely name a person to a particular function of any sort, whether to succeed to an estate or to take property of any kind, if I name him simply without more, then I should say that was a nomination,—it might be called synonymously an appointment. But if I have taken care to name that particular party, and I say that he shall succeed in this respect and no other, he shall enjoy the estate in this respect and no other, he shall take it subject to these fetters and not more freely or absolutely; then if I refer afterwards to what I have done in respect to that by the word "appointment," by the bare literal force of the term, (and it would be a violent construction to give any other sense to it,) it is clear that my intention is not merely to name him, which would be a destination; but, even if it had

been appointment alone without "destination" preceding, the inference would have been, that I intended his nomination to be, in a limited way, subject to those fetters and restrictions contained in the deed. But that is aided, as one of the learned Judges in the Court below, Lord Mackenzie, said, by the preceding word "destination," though I think that the word "appointment" standing by itself would have implied that the whole was given to him *in modo et forma* in which it was expressed. That supports the construction of the resolutive clause put by the Court below; and I have already dealt with the irritant clause, which comes rather unusually after the resolutive clause. We have the words, "dispositions and other deeds whatsomever made or done "contrair to the said provision and destination." That is the whole of the preceding scheme, the successive enjoyments of the estate.

Now, my Lords, with respect to what follows, with respect to the insertion in the precept, we are to assume, when we come to this point, that the two former points have been decided in favour of the judgment of the Court below and against the appellant; and that implies that the word "destination" has the sense imputed to it, and that the word "provision" has the sense imputed to it. We find in the same instrument the Scotch word "provision," (the same identical word used after the words "reservation and reversion,") and therefore that would be sufficient to import it into the former part, and then there is added the word "conditions." The word "condition" is wanting in the irritant, as well as in the resolutive clause. Then it is "these "provisions and conditions" respectively, (that includes them all "above mentioned,") a most general reference, "which are "holden as repeated herein, and are appointed to be contained "and set down;" and if this direction is followed, they must appear, and they must be so set down. We have nothing to do with what is done afterwards. We are now upon the force and effect of the words of the clause in the deed itself at the time it

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was made. For these reasons I entirely agree with my noble and learned friend; nor should I have said so much, he having exhausted the subject, had it not been that this case below has been given, so far as regards the opinion of the learned Judges, somewhat meagrely. One can hardly discover much of the argument, except what is said to have fallen from Lord Mackenzie; and, generally speaking, there is less light thrown upon the specific grounds upon which the judgment was rested below than might have been expected in a case of this kind, it being a case of very considerable importance.

LORD CAMPBELL.—My Lords, in this case I agree that the interlocutor appealed against ought to be affirmed; and although the Judges were unanimous, if my opinion had been that they had made a mistake, it would have been my duty to have said so. Your Lordships have, in repeated instances, reversed the unanimous judgments of the Scotch Judges; and you have, in several instances, acted against the unanimous opinion of the English Judges; but your Lordships are always very much pleased when you are able conscientiously to agree with the opinions of those venerable sages who are appointed to administer justice in one part of the united kingdom or the other.

Now, my Lords, with regard to this case, it seems to me that there is a fallacy, which I have heard again and again at the Bar, and which I myself, when at the Bar, perhaps have resorted to in a very desperate case, which is this, that if there are two senses in which a word may be used, you are to understand that it is used in that sense which is favourable to freedom and not to fetters. My Lords, the fallacy is, that you are not to look to see whether it is possible, under certain circumstances, that a word may have two meanings, but you are to see in what meaning it is used in the deed which you are to construe. If in the deed, in the part of it which is to be construed, the meaning is doubtful, if you cannot tell in which sense

the settler used it, then you are to put that sense upon it which is favourable to freedom, and which is against fetters. But if, looking to the deed itself, it is quite clear in what sense he used it, although, when it appears elsewhere, it may have another sense, you are to put upon it the sense in which he uses it, though that sense may be for fetters and not for freedom. I apprehend, my Lords, that with regard to entails, unless there be some reason to entertain a doubt as to the sense in which expressions are used, you are to give them their fair and grammatical meaning. You are not to look at the general intention of the settler, because in that case you would set up many defective entails, but looking at the particular clause to be construed, if you can give effect to it in the sense in which it is used, putting upon it its natural meaning, you are to give that effect to it.

In this case it is admitted that the prohibitory clause is sufficient. Then it is admitted that if the resolutive clause and the irritant clause have a sufficiently large reference to the prohibitory clause, they also are sufficient. And it is admitted, and very properly, by Mr. Anderson, who is extremely conversant with these subjects, that it is not at all necessary to enumerate in the resolutive clause or the irritant clause, the various things that are limited by the prohibitory clause, and that you are to look to see whether the words in the irritant and resolutive clauses be sufficiently large in their natural and grammatical construction to embrace what is contained in the prohibitory clause. My Lords, in this case then, your Lordships can entertain no doubt, because the resolutive clause is in these words:—"That if "the heir of entail shall at any time coming fail herein, or do "anything contrair to this my destination and appointment, then "and in that case the persons so failing and doing in the contrair "hereof, and the heirs of their bodies, shall amitt and lose their "haill right and benefit in this bond of provision." Now, what is the natural and obvious meaning of the words there, "anything "contrair to *my destination and appointment?*" Why, it is "this

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"settlement," "this deed of entail whereby I have disposed of "my estate, the destination of which I have fixed, and the pro- "visions of which I have laid down." The words here are "contrary to my destination and appointment." Now, if it had been contrary to this "deed of entail," I suppose that would have been sufficient. Would not that have been a sufficient reference to the prohibitory clause? Can there be any doubt that he means, when he says, "contrary to my destination and appoint- "ment," the appointment which he makes by this deed of entail, namely—all the clauses, provisions, and conditions which are therein contained?

But then the language varies a little when it comes to the irritant clause, and instead of appointment it is "provision and "destination," "and all dispositions and other deeds whatsom- "ever, made or done contrair to the said provision and destina- "tion." There again, what does he mean by "provision and "destination?" Does he not mean the settlement of the deed of entail by which he has settled his estate upon the heirs named therein? It was supposed that even if it were so, "disposition "and other deeds whatsomever made or done," was not sufficient. But it is quite clear that there the deeds done means acts done, and comprehends everything which would be an infraction of any part of the prohibitory clause.

My Lords, for this reason it seems to me that, giving the words that are employed in the resolutive clause and the irritant clause each their natural and grammatical meaning, they refer to every thing that is forbidden by the prohibitory clause.

Then, with regard to the third objection, it resolves itself into two branches, because, first, is contended that in the precept of sasine the fettering clauses must *in ipsissimis verbis* be repeated. Now, that certainly is contrary to the course of conveyancing that has prevailed in Scotland for 150 years. It is contrary to an express decision—it would lead to the greatest inconvenience, and it would produce no good whatsoever. There is an obvious

distinction between a reference from one part of the deed to another, and a reference from one deed to another deed, which is not forthcoming, and which there may be no means whatever of consulting.

But when it is said that these fettering clauses should be inserted in the precept of sasine, and in the procuratory of resignation, I say that they are inserted—they are substantially inserted, because there is a direction that they shall be inserted, and it is said that they are to be taken for repeated. And it would be a mere waste of paper and of ink, and of labour, for no purpose whatsoever, to write them over a second time in the same instrument. It would lead most unnecessarily to an aggravation of the evil which we so often have complained of, the unnecessary length of deeds and conveyances of estates.

Then the second objection under this head is, that the words are not sufficient even to direct the insertion of these clauses by way of reference, because it is not as in the Dryburgh case, where I believe the words occur, "that the resolutive and irri-"tant and prohibitory clauses shall be repeated;" those words do not occur. But then the words occur that it shall be, "with, "under, and upon the reservations, reversions, provisions, and "conditions above mentioned, and no otherways, which are "holden as repeated in this present procuratory, and are appointed "to be contained and set down in the instruments of resignation "and in the charters and infeftments to follow hereupon." These fettering clauses must, I think, be understood to be comprehended in the "reservations, reversions, provisions, and conditions above "mentioned." That seems to be a clear direction that those clauses should be inserted in the instrument of sasine, and therefore this objection fails.

Mr. Anderson contended, and most properly contended, as it was his duty to do, by way of objection to this clause of reference, that there might be a due registration of the precept of sasine, altogether suppressing these fettering clauses. It seems to me,

my Lords, that that would not be a due registration—it would be an utter misrepresentation of the precept of sasine, because the precept of sasine is directed to be under the conditions and reservations above mentioned. And if you were to register it as wholly absolute, that would not be a just registration—that would be an utter misrepresentation of the clause which is to be registered. It seems to me, therefore, that that argument, which was put very ingeniously, cannot be supported. Under all these circumstances, my Lords, I agree in the opinion which has been pronounced by my two noble and learned friends, that this judgment must be sustained.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor or judgment therein complained of, be affirmed with costs.

DEANS, DUNLOP, and HOPE—G. and T. W. WEBSTER, Agents.

[10*th March*, 1845.]

WILLIAM PURVES, Writer in Dunse, *Appellant.*

WILLIAM LANDELL, *Respondent.*

*Solicitor and Client.—Damages.*—To make a solicitor liable for the consequences of acts done by him in his professional capacity, either in damages or in relief of monies paid by the client, the summons must expressly aver want of reasonable skill or gross negligence, or shew facts necessarily raising an inference of one or other.

THE respondent brought an action against the appellant, setting forth that Margaret Landell was indebted to him in a sum of money; that she had formerly resided at Coldingham in Scotland, but had sometime previously removed to Berwick-upon-Tweed: "That the pursuer, on being informed of this, was "desirous to obtain payment of the foresaid debt, through the "operation of the Courts of Law in Scotland, and with that view "he applied to Mr. William Purves, writer in Dunse, in order "that the latter, as his professional agent, might advise, and "might adopt what legal measures were necessary for making the "said Mrs. Margaret Brodie or Landell amenable to the Scotch "Courts: That the said William Purves accordingly advised "the pursuer to apply for a Border warrant to apprehend the "person of the said Mrs Margaret Brodie or Landell, until she "should find sufficient caution acted in the sheriff-court books of "Berwickshire, that the debt due to the pursuer should be made "forthcoming as accords, and a domicile appointed within the "said county of Berwick, at which she might be cited, and that, "as well *de judicio sisti* as *judicatum solvi:* That the said "William Purves represented to the pursuer that this mode of "procedure was proper and legal, and the said William Purves "being a regular licensed agent or procurator before the sheriff-"court of that county, the pursuer relied, and was entitled to

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" rely on the accuracy and correctness of these representations: " That the said William Purves accordingly, as the professional " agent and adviser of the pursuer, with the view of obtaining " said warrant, did lodge with James Bell, Esq., sheriff-clerk of " Berwickshire, (the official person with whom applications of " this kind, in the county of Berwick, fall to be lodged,) the in- " formation to be produced in the course of the process to follow " hereon, relative to the debt due to him by the said Mrs. " Margaret Brodie or Landell, and that nearly in the terms " above narrated, and in addition to said information, the pur- " suer, at the desire of the said William Purves, emitted an " oath in presence of the said James Bell to the following " effect" [here followed the affidavit]: " That the pursuer him- " self was ignorant of the correct mode of legal procedure in " cases of this kind; but the said William Purves obtained a " warrant in favour of the pursuer from, and signed by the said " James Bell, in the following terms."

After setting out the warrant in terms, the summons continued,—" That the said William Purves, as the pursuer's agent, " put the said warrant into the hands of a sheriff-officer for exe- " cution in the usual form." It then set forth the proceedings under the warrant, and went on thus: " That the said William " Purves was cognizant of the whole proceedings above detailed, " and advised, conducted, and directed the same, as the profes- " sional agent and adviser of the pursuer." The summons then stated, that the respondent brought an action against Mrs. Landell—that she objected to the jurisdiction on the ground that she was neither domiciled within Scotland, nor had any property within it: That Purves acted in the prosecution of that action: That it was terminated by an interlocutor dismissing it, with expenses: That Mrs. Landell then raised an action of damages against the sheriff-clerk who had signed the Border warrant, and against the respondent, and that in that action she succeeded in obtaining a verdict against the respondent for 500*l.*, and against the

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sheriff-clerk for 300*l.*: That the respondent had incurred liability for costs to his own solicitors, and was subject to pay the 500*l.* and the costs of Mrs. Landell. The summons then continued:—"That "as all the expenses before mentioned incurred by the pursuer in "reference to the foresaid process at his instance against the said "Mrs. Margaret Brodie or Landell, have been occasioned solely "by the foresaid illegal warrant, applied for and procurred by the "said William Purves, professional agent and adviser as aforesaid, "and granted by the said James Bell: And farther, as the "foresaid action of damages raised by the said Mrs. Margaret "Brodie or Landell, and the said sum of 500*l.* found due under "the same, together with the expenses which she may be found "entitled to therein; and together also with the expenses already "incurred, or which may yet be incurred by the pursuer in "reference to the said action, have also all been occasioned solely "in consequence of the foresaid illegal warrant, applied for and "obtained as aforesaid, the pursuer is entitled to be reimbursed "by the said William Purves of the said expenses incurred in "reference to the said action at his instance against the said "Mrs. Margaret Brodie or Landell, and also to be freed and "relieved by the said William Purves of the foresaid sum of "500*l.* of damages, found due by the said verdict, or of whatever "sum of damages, if any, may ultimately be found due by the "pursuer to the said Mrs. Margaret Brodie or Landell in the "aforesaid action of damages; and also to be freed and re-"lieved by the said William Purves of the expenses, if any, "which the said Mrs. Margaret Brodie or Landell may be "found entitled to, in regard to the said action of damages; and "also to be reimbursed by the said William Purves of the "expenses which the pursuer has himself incurred, or may yet "incur in reference to the said action of damages; and generally "to be freed and relieved by the said William Purves of the "whole consequences and effects of the said action of damages "itself."

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Upon these statements the summons concluded that the appellant should be decreed to pay the expenses which the respondent had paid to his own solicitor, in respect of the above actions, and those also to which he was subject to be made liable for to Mrs. Landell, and for relief of the 500*l.* of damages, which he had been decreed to pay to Mrs. Landell.

The record was made up on summons, defences, condescendence, and answers. The respondent added to the averments in the summons a statement in his condescendence, in these terms:

"The whole of the foresaid expenses, and all other expenses "which the pursuer may yet incur, or in which he may be found "liable, and also all the loss and damage in which he may yet "be involved, have arisen solely from the rashness or ignorance "of the defender, Mr. Purves, in applying for, and obtaining "and giving directions for putting in force a warrant which "has been decided to be utterly illegal and incompetent. The "defender, Mr. Purves, undertook, as the pursuer's law agent, to "obtain a valid and legal warrant, and being a regular procurator "also, all the loss and damage in which he may yet be involved, "have arisen solely from the rashness or ignorance of the defen- "der Mr. Purves, in applying for and obtaining, and giving "directions for putting in force a warrant which has been "before the sheriff court of Berwickshire; and holding himself "out as qualified to conduct, in a proper manner, any legal pro- "ceedings with which he might be intrusted, the pursuer relied "upon his obtaining a proper and sufficient warrant, and upon "his adopting the legal means for this purpose. The pursuer "himself being entirely unacquainted with legal proceedings, "was obliged to rely upon those who held themselves out to be "qualified for advising and conducting law proceedings in a "proper manner."

The respondent's plea in law, in support of his action, was as follows:—

"The pursuer having employed the defender as his profes-

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" sional agent to conduct the proceedings above mentioned, the " defender is bound to repair to the pursuer, and to indemnify " him against any loss or damage which has arisen from the " illegality of the warrant above mentioned, or from his ignorance " or want of skill."

The appellant pleaded in defence the following among other pleas:

" Even on the supposition that the pursuer's statements were " correct, the summons does not set forth any facts *relevant* to " subject the respondent in liability in terms of its conclusions. " It is not alleged that he exhibited gross neglect in the conduct " of the judicial proceedings adopted by the pursuer against Mrs. " Landell, or that he violated any law or regulation of the Court " before which he is said to have acted in the matter as the " pursuer's agent."

The Lord Ordinary (*Cockburn*) remitted the cause to the issue clerks for the preparation of an issue to be tried before a jury; but the clerks having intimated that they were unable to frame an issue on the matter in the record, the cause returned to the Lord Ordinary, who, on the 19th March, 1842, pronounced the following interlocutor, adding the following note:

" The Lord Ordinary having heard parties, and considered " the process, sustains the defence of irrelevancy, and assoilzies " the defender, and decerns: Finds the defender entitled to ex- " penses; appoints an account thereof to be lodged, and remitted " to the auditor to tax and report.

" NOTE.—The Lord Ordinary sent this case to the Issue " Chamber, because he thought that any unavoidable question of " law that might arise would be disposed of more satisfactorily at " a trial. But it having been brought back without an issue, " and both parties preferring to have the relevancy settled now, " he gives his judgment on it.

" If all the matter in the condescendence and answers, and " still more in the defences, could be competently taken into view, " a trial of the facts could not be avoided; but, correctly speaking,

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"the sole point is, does the summons present a relevant case for "the relief sought?

"The Lord Ordinary thinks it does not, and this simply, because it neither sets forth negligence nor ignorance, nor any "other ground for making a law agent responsible to his em- "ployer for a legal error. The responsibility of one party to "another party is a different affair, and depends on different "principles, but all that an employer has a right to expect from "his agent is due skill and care. This principle was distinctly "recognised in the two important and well considered recent "cases of Rowand and of Lang, particularly in the House of "Lords, where it was laid down that a solicitor is not answer- "able for every mistake in point of law, when he does not take "it upon himself to 'depart from the *ordinary and beaten course.*' "Not only is nothing of the kind alleged here, but at the Bar "everything of the kind was expressly disclaimed, and the action "was maintained merely on the fact that the warrant, said in "the summons to have been recommended, obtained, and exe- "cuted by the defender, has been found to be '*illegal and* "'*irregular.*' So it has. But its having been so is not of itself "inconsistent with the defender's having the best possible reason "for believing that it was regular and lawful. Now the pursuer "does not say that the defender acted unskilfully or negligently. "He says the reverse. In this situation, though it be hard on "the pursuer to have to pay such a sum to the party he was the "cause of injuring, it would be much harder that this misfor- "tune should be laid on the agent from whom he purchased "nothing but adequate skill and care, both of which he does not "deny that he had.

"The pursuer endeavoured to distinguish the case of *an* "*infringement of personal liberty by a warrant* from other cases. "In so far as the agent's responsibility is concerned, the Lord "Ordinary sees no ground for any such distinction. Can an "agent be required to do more, even in cases of warrants and of

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" personal liberty, than to give his client due intelligence and " due caution?"

The respondent reclaimed against this interlocutor, and on the 27th of May, 1842, the Court altered it by an interlocutor in these terms. Vide 4 *B. M.* & *D.*, 1300.

" The Lords having advised the reclaiming note for the pur- " suer, and heard counsel for the parties, alter the interlocutor " complained of, find the summons relevant, and remit to the " Lord Ordinary to proceed farther in the cause, reserving all " questions of expenses."

As it was not certain whether the Court had been unanimous in giving this interlocutor, the appellant presented a petition for leave to appeal. The Court superseded giving any interlocutor on the petition until after issues should have been adjusted; and for this purpose the cause was again sent to the issue clerks, who again reported to the Lord Ordinary that they were unable to frame an issue. The respondent himself drew out an issue and submitted it to the Lord Ordinary, (now *Lord Jeffrey*,) who reported it to the Court. That issue was in these terms:—

" It being admitted that the warrant referred to in process " was issued upon the 6th July, 1836, and was thereafter put in " execution.

" And that in an action raised in the Court of Session at the " instance of the present pursuer, against Mrs. Margaret Brodie " or Landell, the person named in the said warrant, the follow- " ing preliminary defences were stated by the said Mrs. Margaret " Brodie or Landell,—' That the defender neither being domi- " ' ciled in Scotland, nor having any property or effects in it, is " ' not within the jurisdiction of the Court of Session, and the " ' irregular and illegal proceedings' (meaning the said warrant " and the execution thereof) ' which were adopted to force the " ' defender within the jurisdiction of the Scotch Courts, are " ' altogether ineffectual for that purpose.'

" And that Lord Jeffrey, as Ordinary, having reported this

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'cause to the Court, and issued a note, in which it was stated "that the said proceedings were illegal and irregular, the Court, "on the 26th January, 1838, pronounced the following inter- "locutor:—'The Lords, on the report of Lord Jeffrey, having "'advised the cases for the parties, and whole proceedings, and "'heard counsel, sustain the preliminary defences; dismiss the "'action, and decern: Find expenses due, and allow the account "'to be given in and audited in common form;' and that decree "was thereafter pronounced in that action against the present "pursuer, Mr. Landell, for 119*l.* 0*s.* 7*d.* of expenses, and for "2*l.* 5*s.* 1½*d.*, as the expense of extract; and that he also paid to "his own agent, as the expenses in the said process, the sum of "69*l.* 8*s.* 8*d.*

"And it also being admitted that an action of damages was "thereafter raised by the said Mrs. Margaret Brodie or Landell "against the present pursuer, and also against James Bell, "sheriff-clerk of Berwickshire, in which action the following "issues were adjusted and sent to trial.

"'It being admitted, that by a final judgment of the Court, "'of date 26th January, 1838, the warrant, No. 5 of process,' "(being the warrant above referred to) 'was decided to be illegal "'and irregular,—1st, Whether, at Dunse, on or about the "'6th day of July, 1836, the defender, James Bell, being "'Sheriff-clerk of the county of Berwick, granted or issued the "'said warrant, to the loss, injury, and damage of the pursuer? "'2nd, Whether the defender, William Landell, applied for "'and obtained the said warrant, to the loss, injury, and damage "'of the pursuer? 3rd, Whether, by virtue of the said warrant, "'the pursuer was, on the 7th day of July, 1836, apprehended "'and imprisoned in the jail of Greenlaw by the said defenders, "'or one or other of them, and was detained therein from on or "'about the 7th day of July foresaid, till on or about the 12th "'day of the said month, or during any part of the said period, "'to her loss, injury, and damage?'

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" And that the jury, at the trial of the said issues on 13th " March, 1840, returned a verdict for Mrs. Landell, on all the " issues, and assessed the damages against the present pursuer, " William Landell, at 500*l.*, and against the said James Bell " at 300*l.*

" Whether the pursuer employed the defender as his law " agent to adopt legal measures for making the said Mrs. Mar- " garet Brodie or Landell, the person named in the said warrant, " amenable to the Scotch Courts; and whether the defender " advised the pursuer to apply for said warrant, and represented " the same to be legal and proper; and whether the defender " thereafter, acting as agent aforesaid, obtained the said warrant, " and after he obtained the same from James Bell, sheriff-clerk " of Berwickshire, gave instructions to the sheriff-officer for " putting the said warrant into execution against the said Mrs. " Margaret Brodie or Landell, by imprisoning her in the jail of " Greenlaw, whereby the pursuer was to his loss and injury " subjected to the expenses and damages, of which he demands " to be relieved by the defender?"

Upon this issue being reported to the Court they granted the prayer of the appellant's petition for leave to appeal. Vide 4 *Bell & D.*, 1543.

*Lord Advocate* and *Mr. Turner*, for the Appellant.—If all that is stated in the issue were found for the respondent it would not infer liability against the appellant. The grounds of a Solicitor's liability to his client, for anything done in that character, are gross negligence, ignorance, or want of skill. There must either be breach of duty or breach of contract, but neither is alleged. The gist of the action is that the warrant applied for and obtained by the appellant has been found to be illegal, but if that, *per se*, were sufficient to subject the appellant, the principle, if applied in every case, would go the length of subjecting not only counsel for the result of their opinions, but inferior

Judges for their judgment, on their being reversed by the Superior Courts. So long as a Solicitor follows the beaten track of the profession, and does nothing which is fairly imputable to gross neglect of duty, or to gross ignorance of ordinary professional rules, he is entitled to the same immunity from the consequences of his professional acts as the other branches of the profession, and therefore, without an averment of something amounting either to such negligence or ignorance, the respondent had no case which could go to a Jury.

It seems to be admitted that the respondent's action would not lie for the debt due by Brodie, but a distinction is made because it is for relief of the sums he has had to pay, but no ground is shown for any such distinction.

*Mr. Kelly* and *Mr. Anderson* for the Respondent.—In the action of damages at Brodie's instance every act which is alleged in this to have been taken under the advice of the appellant was held to be illegal, and so grossly so that it ought to have been known to every practitioner; the allegations show that Brodie was not resident in Scotland, or subject to the jurisdiction of the Courts in that respect, and yet that, instead of a *meditatione fugæ* warrant having been applied for, a Border warrant was resorted to, and that every step taken under it was illegal. On the assumption, then, that the Judges below were cognisant of the law, they were entitled to take into consideration the notorious illegality of these acts in judging of the relevancy of the allegations. It is not necessary, by the rules of Scotch pleading, that negligence or want of skill should in words be averred when the case stated shows that these are to be inferred.

In Graham *v.* Allison, 9 *D. B.* & *M.*, 130, the proceedings adopted by the Solicitor having been erroneous, he was ordered to repay the money which had been paid to him. That judgment was affirmed—5 *W.* & *Sh.*, 101—and shows, that though the circumstances may not be sufficient to infer liability in

damages, they may be sufficient to subject the Solicitor in repayment of what has been rendered useless through his negligence. So far, therefore, as regards recovery of the expenses at least it cannot be necessary to aver negligence.

[*Lord Chancellor.*—In Allison's case it was held that the money paid to the Solicitor himself might be recovered, but that is not the case here.]

In substance the case is the same, and indeed if costs may be recovered, it is difficult to see why damages may not. In Rowand *v.* Stevenson, 4 *Wil.* & *Sh.*, the liability of the Solicitor was sustained without any averment of negligence.

[*Lord Campbell.*—The averments showed a duty and a breach of that duty.]

Undoubtedly, but in what form, and in what terms,—not expressly but in equivalents,—that case is therefore an authority of this House that an averment of negligence in terms is not necessary if the statements raise it inferentially. In Lang *v.* Struthers, 2 *Wil.* & *Sh.*, 563, the averment was, "through the "said John Lang having *improperly omitted* or *neglected*;" but "improperly" is not a legal averment of negligence.

LORD BROUGHAM.—My Lords, in this case I move that your Lordships proceed to reverse the interlocutor of the Court below, without hearing the learned counsel for the appellant in reply. I never saw a case which stood, in my opinion, upon clearer grounds. The learned Judges of the Court below were very much divided in opinion upon this case. It is a great mistake to represent it as a case in which there was no very great difference of opinion; Lord Cockburn clearly expressing an opinion, and the Lord Ordinary, Lord Jeffrey, leaning the way in which we have heard at the Bar; Lord Moncreiff going a great deal further than merely expressing a doubt or an inclination of opinion, because Lord Moncreiff's opinion upon the very point, the main point and pivot upon which this case turns, was that

the Court was wrong, and he differed with the Court, and thought there ought to have been on the record an allegation of negligence.

My Lords, I apprehend it to be by no means a technical question here depending upon the rules of pleading, but it is of the very essence of the action; that this action depends not upon a miscarriage in point of fact, not upon the party having been advised by a solicitor or attorney in a way in which the result of the proceedings may induce the party to think he was not advised properly, and in fact may prove the advice to have been erroneous—not upon his having received, if I may so express it, in common parlance, bad law from the Solicitor; nor upon the solicitor or attorney having taken upon himself to advise him, and having given an erroneous opinion, which the result proved to be wrong, and in consequence of which error the parties suing under that mistake, were deprived and disappointed of receiving a benefit. But it is of the very essence of this action that there should be a negligence of a crass description, which we call *crassa negligentia;* that there should be gross ignorance, that the man who has undertaken to perform the duty of an attorney, or of a surgeon, or an apothecary, (as the case may be,) should have undertaken to discharge a duty professionally for which he was very ill qualified, or if not ill qualified to discharge it, which he had so negligently discharged as to damnify his employer, or deprive him of the benefit which he had a right to expect from employing him. That is the very ground Lord Mansfield has laid down in that case to which my noble and learned friend on the woolsack has referred a little while ago, and which is also referred to in the printed papers. It was still more expressly laid down by Lord Ellenborough in the case of Baikie *v.* Chandless, which is reported in my noble friend's Reports, 3 *Camp.* 17; because Lord Ellenborough uses the expression, according to my recollection, "An attorney is only liable "for *crassa negligentia.*" Therefore the record must bring

before the Court a case, either by stating such facts as no man who reads it will not at once perceive to be, although without alleging it in terms, *crassa negligentia*, something so clear that no man can doubt of it; or, if that should not be the case, then he must use the very averment that it was *crassa negligentia*.

I will not go so far as to say, that if it were for some very gross case, such, for instance, as a man advising his client that his eldest legitimate son was not his heir-at-law, or any other thing which upon the face of it shews gross ignorance of the A B C of his profession, and the most crass negligence in the performance of his professional duty, in such a case it is not necessary to go so far as to say, that that would not be equivalent to that which is wanting, namely, an averment in terms of impropriety, of breach of professional duty, or want of sufficient knowledge, or gross and crass negligence. It is not necessary to proceed upon that whether in England it would not, or whether in Scotland it might be, sufficient. For aught I know it might; but that is not the case here. It is merely set forth that a Border warrant was issued, and it is further stated that a personal damnification took place. That is all. There is no statement of the facts which at once explains itself, so that he who runs may read. Nor is there a statement in terms that there was gross negligence. The case is wholly a blank upon these two matters, one or other of which ought to appear on the record, otherwise the action does not lie.

Now that being the case, I cannot go into the alarming doctrine laid down by the Lord Justice Clerk, which I hold to be quite erroneous, and which I think is not accurately reported. It is said it is unnecessary to allege that Mr. Purves was guilty either of want of skill or of negligence. It is enough to allege that what he had done was a nullity.

Now the mere allegation and proof of such a fact as that could never be sufficient; because, unless a great deal more is proved, you may just as well say, that every nonsuit, or every

action that failed, or every case in which what is called an unfructious proceeding has taken place, even though the attorney should really be successful in the case, yet if, notwithstanding that, there should not be a beneficial result from the action, that would make the attorney liable. No man can possibly conceive that such is the liability of an attorney. There must be considerable mismanagement, considerable ignorance, and the absence of attentive conduct in general. Unless it is gross, the law holds that it is sufficient.

Now it is said there are these cases here, the case in Murray's reports and others, and the case before me in 1833, in which it is said there was a clear averment; but that although the negligence was not sufficiently proved to entitle the party to damages, it was sufficiently proved to entitle the party to the restitution of the money paid; that there is something different in the proceedings in England and Scotland in those respects: that is not the case. But if there were, the argument would only go to shew, that because there is a difference in one respect, that therefore there must be a difference in the other, which is a very unsatisfactory mode of reasoning.

Now it is alleged in the summons that Mr. Purves had notice of Lord Jeffrey's interlocutor, which was against him, and that therefore he was bound to indemnify his client from the consequences of his having advised him, in the teeth and in the face of that interlocutor, to reclaim to the Inner House. It would be his bounden duty to do so; it would be his bounden duty to advise him not to rest satisfied with the first unfavourable opinion, and to see whether it was well founded. If it were not so, you might just as well say, that in every case in the Courts below where the decision is against a man, and from which he appeals here, that if it is affirmed upon appeal there is crass negligence, or at least, a case entitling the party who has lost the appeal to an indemnity; because, the man who was served with the notice in the course of the business, was aware

that there had been a decision against his client below, and therefore he ought to have known that his clients could not succeed upon appeal. Such a doctrine never could be maintained.

I am of opinion, upon all these grounds, that there is no reason to support the interlocutor of the Court below, and that it must be reversed.

LORD CAMPBELL.—My Lords, I am extremely sorry for the situation in which Mr. Landell is placed; but we must not be carried away by feelings of compassion, we must be bound by the principles of law, and upon those principles I have no doubt at all, that Lord Cockburn and the Lord Ordinary took a just view of this case, and that we are bound to follow their decision.

Now, what is the action we are to determine upon? It is the action of Landell against Purves; and in this case William Landell complains, that he having brought an action against Margaret Landell, and having retained Mr. Purves as his professional adviser, that in the proceeding of that action against Margaret Landell, Mr. Purves, his professional adviser, was guilty of misconduct, whereby an action was brought against him by Mrs. Margaret Landell, and damages and costs were recovered which he was obliged to pay. Well, my Lords, what is necessary to maintain such an action? Most undoubtedly that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence, or with gross ignorance. It is only upon one or other of those grounds that the clients can maintain an action against the professional adviser. And thus far it is quite unnecessary here to look at the case that has been referred to, which came on in this House in the time of Lord Mansfield; because there the action was to recover back money which had been paid by the client to the professional adviser. It was a totally different proceeding from that which we have now to determine upon.

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Now, in an action such as this, by the client against the professional adviser, to recover damages arising from the misconduct of the professional adviser, I apprehend there is no distinction whatever between the law of Scotland and the law of England. The law must be the same in all countries, where law has been considered as a science. The professional adviser has never been supposed to guarantee the soundness of his advice. I am sure I should have been very sorry when I had the honour of practising at the Bar in England, if barristers had been liable to such a responsibility. Though I was tolerably cautious in giving opinions, I have no doubt that I have repeatedly given erroneous opinions; and I think it was Mr. Justice Heath who said that it was very difficult to call upon a gentleman at the Bar to give his opinion, because it was calling upon him to conjecture what twelve other persons would say upon some point that had never before been determined. Well, then, this may happen in all grades of the profession of the law. Against the barrister in England, and the advocate in Scotland, luckily no action can be maintained. But against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent, and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee and bind themselves, in giving legal advice, and conducting suits at law, to be always in the right.

Then, my Lords, as *crassa negligentia* is certainly the gist of this action of Landell against Purves, the question is, whether in the summons that negligence must not either be averred or shown? This is not any technical point in which the law of Scotland differs from the law of England. I should be very

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sorry to see applied, and I hope this House would be very cautious in applying technical rules which prevail in England to proceedings in Scotland. But I apprehend the summons ought to state, and must state, what is necessary to maintain the action. Then, if negligence is necessary to maintain the action, this summons must either allege negligence, or must show facts which inevitably prove that this person has been guilty of gross negligence. Now here it is not at all pretended that there is any allegation of negligence.

Then, what is the fact shown from which negligence is necessarily to be inferred? Why, there is a warrant which was sued out by Mr. Purves, by his advice, against Margaret Landell, while she was living at Berwick, upon the borders of the kingdom of Scotland, she not being domiciled in Scotland, but being domiciled in England. It was held that upon that ground that warrant was void. It might have been subject to other objections for anything I know to the contrary; but it was held void upon that ground that she neither had property in Scotland, nor effects in it, which was necessary *ad fundandam jurisdictionem;* nor was she domiciled in Scotland, and so was not liable to be sued in the Courts of Scotland. It was upon these grounds that the warrant was held to be insufficient, and that the action of Landell against Margaret Landell failed, namely, that Margaret Landell was not liable to be sued in the Courts in Scotland. And why? Because she was not domiciled in Scotland, and had no land and no property or effects *ad fundandam jurisdictionem.* Was that sufficient to make a case, when the question was, was he guilty of negligence? It might have been proved that she had large property in Scotland. He might have been told that she had been domiciled in Scotland. He might have been told that she had been living so long away from England—that she had abandoned all thoughts of returning there, and had removed her household gods to Scotland, and represented that as her domicile. It is possible he might have been told that that was the fact,

although it turned out that she was not domiciled in Scotland, and had no property in Scotland.

How then can we inevitably infer from the simple fact of the warrant being found bad, that Purves was guilty of gross negligence? He may have been. I know nothing one way or the other. It is possible that he may have been guilty of gross negligence. He may have been informed that Margaret Landell was domiciled in England. He may have been informed that she had some property in Eglannd, and he may have been guilty of gross negligence in suing out the warrant. But it is not here alleged. If it had been, and he had denied it, then the issue would have been plain, and a trial before a jury could have taken place, and then the evidence would have shown whether he was guilty of negligence in suing out the warrant, or whether he had acted with due care and caution, and the warrant had turned out to be bad, notwithstanding all the care and caution he could exercise.

It seems to me, therefore, my Lords, that upon principles as to which there can be no doubt, this summons is defective, because it neither alleges what is necessary to maintain the action, nor does it shows facts that raise a necessary inference that any gross negligence did exist.

We were referred to a case to show that, by the law of Scotland, it is not at all necessary to show in the summons that there has been negligence. But that was where there had been a breach of duty. The strongest case is that of Rowand *v.* Stevenson. Now, when we examine that case, as set out by the appellant in his printed case, it appears that it was upon that summons abundantly set out, because the action is brought for the breach of a specific duty, which duty is set out upon the face of the summons. There is upon the face of the summons an allegation "that Stevenson did not complete the said security in a "legal manner, by obtaining from the superior any confirmation "of the said bond and disposition in security, or of the aforesaid

" instrument of sasine following thereon. That it was incumbent " upon the said Nathaniel Stevenson to procure a legal and valid " security for the said Henry Wardrop and the pursuer, so as to " render it complete and effectual against all subsequent deeds; " and as the pursuer has sustained much loss, damage, and " expense, in consequence of the said Nathaniel Stevenson having " drawn and completed the said heritable security in such form " and manner as has postponed the same to a posterior security " and burden over the said lands and others, he is bound in law, " justice, and equity, to free and relieve the pursuer from such " loss, damage, and expense."

Now what does that mean? It is a plain allegation that it was the duty of Stevenson to have procured the security there stated to be framed in a particular manner, and that he had not procured it to be framed in that particular manner, whereby a loss had accrued to the party who complains. Upon this it would have been the easiest thing in the world to frame an issue whether it was incumbent upon Stevenson to do it, and whether he had failed in the discharge of his duty. But upon the summons here it would be impossible to frame any issue, because the only issue that could be framed has been framed by the clerk who discharges that duty. He has looked at the summons, and he has framed the best issue that the summons would admit of; because, upon the face of it, we find the issue avers a finding in favour of the pursuer, which would not have been found by the special finding of the Jury, because although the warrant might have been wrong, he still might have acted with the greatest care.

There is no attempt whatever to show that in such an action, by the practice of the law of Scotland, it is not necessary for a man to allege negligence, or to show facts from which negligence must inevitably be inferred.

As to the distinction between actions affecting the liberty of the subject and other actions, it has been very properly observed

by my noble and learned friend that that learned and most laborious judge must have been inaccurately reported with respect to that distinction; because, if the report is accurate, it seems that upon all other actions negligence must be alleged, but that when there is any proceeding that touches the liberty of the subject, then, without any allegation of negligence, the professional adviser is liable, if there has been any mistake. Now it is enough to say that there is no authority for that distinction in the law of Scotland, and there seems to me to be no principle for it, and there being neither principle nor authority, and it having been abandoned by the counsel for the respondent, I should not say a word about it, except that it seems to me that there must have been some mistake in the report, because, although some proceeding may have taken place, whereby the liberty of the subject may be affected in the course of a judicial proceeding, yet no one could be liable but the professional adviser, and he cannot unless he has been guilty of some negligence, as he does not guarantee the correctness of the advice which he gave in that instance.

For these reasons, my Lords, I think the reasoning of the Lord Ordinary, in his note, is perfectly satisfactory, and I regret that it came before the Second Division of the Inner House, and that Lord Moncreiff's doubt or opinion did not prevail. I regret that there has been this distinction attempted to be made, because the distinction does not rest upon principle or authority, and therefore I apprehend that this interlocutor of the Second Division must be reversed, and that the interlocutor of the Lord Ordinary should be affirmed. And I presume now that the judgment of this House should be that Mr. Purves be assoiled from the conclusion of the summons, and the interlocutor be recalled.

LORD CHANCELLOR.—My Lords, I am of the same opinion that has been expressed so fully and so ably by my noble and

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learned friends in this case. It is quite unnecessary for me, after the detailed manner in which they have adverted to the particular facts of the case, to go over the same ground. Therefore I will state, in a very few words, the principle upon which I think this question should be decided, and in fact it is nothing more than a repetition of what has been stated by my two noble and learned friends.

It is quite clear that the summons must state a sufficient cause of action. When an action is brought against a solicitor, he is liable merely in cases where he has shown a want of reasonable skill, or where he has been guilty of gross negligence. The summons, therefore, I apprehend, must state either a case of want of reasonable skill or a case of gross negligence, or a case of breach of duty. Now it is quite clear in this case that upon the summons there is no positive statement of any want of reasonable skill, or any express statement of negligence; and I am of opinion that upon the other facts stated in this summons there is nothing equivalent to this averment. It follows, therefore, that the summons in this respect is defective, and I think that the interlocutor of the Court below ought to be reversed.

Ordered and adjudged, That the interlocutor of the 27th May, 1842, complained of in the said appeal, be reversed; and it is further ordered, that the cause be remitted back to the Court of Session in Scotland, with directions to that Court to adhere to the interlocutor of the Lord Ordinary of the 19th March, 1842, (mentioned in the appeal,) and to proceed further therein, as shall be just and consistent with this judgment.

SPOTTISWOODE and ROBERTSON—ALEXANDER DOBIE, Agents.

[11*th March*, 1845.]

JOHN HAMILTON, Bleacher, Paisley, *Appellant.*

JAMES WATSON, Cashier to the Glasgow and Ship Bank Company, *Respondent.*

*Cautioner.*—A bank requiring security for a cash credit is not bound to disclose voluntarily to the proposed surety the particular application intended to be made of the money to be advanced on the credit.

IN 1835, Peter Elles, merchant in Glasgow, obtained from Carrick, Brown, and Co., carrying on business as bankers in Glasgow under the firm of "The Ship Bank," a cash-credit for 750*l.*, on the security of a bond for that amount by himself, David Anderson, Alexander Dewar, and James Elles.

On the 24th March, 1835, the whole of the credit was drawn out. Alexander Dewar having died, the bankers, in December, 1835, wrote Elles, requesting that "the credit might either be "paid up, or renewed with additional security." Some other communications took place in regard to additional security, which went off without anything having been done.

In July, 1836, Carrick, Brown, and Co. made an agreement with the Glasgow Bank Company that the business of the two banks should be merged together, and carried on under the firm of "The Glasgow and Ship Bank Company."

This was accomplished by a deed bearing date the 19th of July, 1836, between Carrick, Brown, and Co., of the first part, and the Glasgow Bank Company of the second part, whereby it was agreed, among other things, as follows:—"In consideration "of the sum agreed to be paid, and obligations undertaken by "the said second party as after specified, the said first party bind "and oblige themselves and their foresaids, to transfer and convey "from them to the said second party, the whole banking business "and establishment of the said first party, and their whole

" property, bonds, personal and heritable, deposit-receipts, bills, " notes, and other obligations and securities, (under the exception, " reservation, and provisions after mentioned,) together also " with the good-will of their said banking business, and the " whole rights, privileges, and advantages thereof, as presently " enjoyed by the said first party as a banking concern, in any way " or manner whatsoever; all to be henceforth enjoyed and peace- " ably possessed by the said second party, in terms of the contract " of copartnership; with full power, warrant, and authority, to " the said second party to re-issue the bank notes of the said first " party, so long as they shall judge it expedient so to do, and to " operate payment of the bonds, bills, and others due to the said " first party, (under the provision after written,) as fully and " freely in all respects as the first party could do themselves: " And the said first party farther bind and oblige themselves and " their foresaids to hand over the said bonds, bills, and others " held by them, to the second party, and to indorse and guarantee " the payment of such of them as the second party shall, within " one month from the date of these presents, require them to " indorse and guarantee; and likewise to grant, execute, and " deliver such dispositions, conveyances, and other writings as " shall be necessary for divesting themselves of, and for investing " the said second party in the premises in the most ample manner."

" In consideration of the obligations before-written, and as " part of the stipulated price, worth, and value of the same, the " said second party hereby bind and oblige themselves and their " foresaids, at one and the same time with receiving the indor- " sations, transfers, and conveyances aforesaid, to grant, assign, " and transfer to the said Michael Rowand, for himself, and as " trustee for the other partners of the said company of Carrick, " Brown, and Company, according to their respective interests in " the same, as fixed by their present contract of copartnership; " and failing the said Michael Rowand by death, to Alexander " Galloway, Junior, accountant to the said Ship Bank Company,

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"as trustee for the said partners, 200 shares in the original "stock of the said Glasgow Bank Company, amounting, at the "agreed rate of 160*l.* per share, to the sum of 32,000*l.* sterling: "and it is hereby provided and declared, that the first party "shall, in their option, have right to draw the dividends payable "on the said 200 shares of stock to be transferred to them as "aforesaid, for the six months from the 30th day of June last to "the 1st day of January next, and in time coming thereafter; or "if, on or before the expiry of the said six months, the said "Michael Rowand, failing whom, the said Alexander Galloway, "Junior, shall intimate the desire of the first party, or any of "them, to draw their proportions of the said 32,000*l.* in money, "the second party bind and oblige themselves and their foresaids "in that event to pay such proportions accordingly to the said "Michael Rowand, failing whom, to the said Alexander Gal- "loway, Junior, as trustees foresaid, and that on demand, on the "expiry of the said six months, with interest thereon at the rate "of four per centum per annum, from and after the said 30th "day of June last, and until payment."

"The second party bind and oblige themselves and their "foresaids, to take up, pay, and retire the whole notes, deposit- "receipts, and other obligations of the said first party now cur- "rent, as well as the sums at the credit of the individual partners "of the said Ship Bank Company in their respective stock "accounts, the particulars of the said obligations, sums, and others, "and of the assets placed against the same by the first party, "being stated in their balance sheet, docqueted by the said Mi- "chael Rowand and Robert Findlay as relative to these presents."

"If the second party shall decline to accept any of the bonds, "bills, and other obligations, due and indebted to the first party, "and to be conveyed by them as aforesaid, at the full value of "the same, such bonds, bills, and other obligations shall remain "with the said Michael Rowand, failing whom the said Alex- "ander Galloway, Junior, as trustee aforesaid, for the period of

" two years from and after the date of these presents, during which " period the said Michael Rowand, failing whom the said Alex- " ander Galloway, Junior, shall be at liberty to exercise his own " discretion in recovering payment of the same, and shall pay to " the second party interest at the rate of three per centum per " annum on the amount thereof, and at the expiry of the said " two years the first party shall be bound and obliged to pay to " the second party the amount of the said bonds, bills, and other " obligations, so retained as aforesaid, on which payment being " made, the said bonds, bills, and other obligations, shall remain " the property of the first party."

Part of this arrangement was, that Rowand, the secretary, and Galloway, the accountant of Carrick, Brown, and Company, should be continued in the service of the united company. The union of the two banks was intimated to the public by an advertisement in the public papers of the 30th July, 1836.

On the 12th of August, 1836, a letter signed by Carrick, Brown, and Company, was sent to Peter Elles in these terms:—

" Sir,—It being deemed necessary, in consequence of the " junction of this bank with the Glasgow Bank, that the bonds " of credit, and other obligations with these respective establish- " ments be either called up, or renewed in the name of the new " firm, I am directed to intimate to you, on behalf of the Ship " Bank, that no farther operations can be allowed on your cash- " credit with them for 750*l.*, and that the balance due by you " under said credit, must be paid up, on or before the 1st Sep- " tember next. Waiting your reply, we are, &c."

Elles answered this letter by proposing to give a new bond with the same sureties, substituting his brother Malcolm Elles, a merchant in Oporto, for Dewar, deceased. On the 25th of August, Elles received a reply in these terms:—" I have sub- " mitted your letter of the 22nd to the bank company, and am " desired to say that they decline at present giving the credit " requested." Elles then proposed the addition of the appellant

to the other sureties offered by him. On the 29th March, 1837, while as yet nothing had been done on this proposition, a letter by Galloway, "pro Carrick, Brown, and Co.," was sent to Elles in these terms:

"Sir,—We beg to inclose statement of your cash-account "with us under credit for 750*l.*, balanced of the 24th instant by "817*l.* 10*s.*, in our favour, which we trust will be found correct; "and as we observe that the interest due at last settlement has "not been paid, we desire that it may be attended to, with the "interest due at this time. We are, Sir, your mo. obt. St."

The proposal for giving a bond with the substitution of Elles's brother at Oporto for Dewar, seemed afterwards to have been entertained by the Bank, under the firm of Carrick, Brown, and Co., for on the 2nd May, 1837, a letter from that firm was sent to Elles in these terms:—"Sir, I desire to know whether you "have got back the bond from Oporto, sent there for your brother's "signature. A great deal of delay has taken place in getting "this matter completed. Waiting your answer, we are, &c."

On the 7th of May, 1837, Elles wrote to Galloway, that his brother declined to become the surety, and saying that he could find as good in Glasgow.

On the 10th May, 1837, a letter signed by Galloway, for "Carrick, Brown, and Co." was sent to Elles, in these terms:— "Sir, I have submitted your letter of the 7th to the Bank Co., "and am directed by them to say, seeing that your brother has "declined signing the bond, that they will expect the amount of "your credit to be paid up at the approaching term."

Subsequently, a bond was prepared and sent to Elles, by a letter dated 23rd August, 1837, and signed by Carrick, Brown, and Co., in these terms:—"Sir, We enclose the bond for signa- "ture; please get it signed at the pencil-markings, and, when "finished, hand us a note of the dates of subscription, and desig- "nation of the witnesses. We are, &c."

All the letters from Carrick, Brown, and Co., were written

from the office in which the business of the Glasgow and Ship Bank was carried on.

On the 6th of October, 1837, the bond, which was in favour of "the Glasgow and Ship Bank Co.," was signed by Elles and his sureties, the appellant being of the number. Its recital was in these terms:—"We, Peter Elles, manufacturer, "Glasgow, sole partner trading there under the firm of Elles, "Hutcheson, and Company, manufacturers, Glasgow; David "Anderson, manufacturer, Glasgow; the Reverend James "Elles, minister, Salt-coats; and John Hamilton, bleacher, "Blackland Mills, near Paisley, considering that the company "carrying on business in Glasgow as bankers, under the firm "of the Glasgow and Ship Bank Company, have agreed to "allow us credit on a cash-account, to be kept in the books "of the said bank company at their office in Glasgow, in name "of the said firm of Elles, Hutcheson, and Company, to the "amount of 750*l.* sterling, on our granting these presents." And it bound the parties to pay the sum of 750*l.*, "or such part or "parts thereof as shall appear to be due to the said Glasgow "and Ship Bank Company, on the said cash-account to be kept "in their books in name of the said firm of Elles, Hutcheson, "and Company, as aforesaid, upon their drafts or orders on, or "receipts to the said Glasgow and Ship Bank Company, or the "cashier or cashiers, manager, or other officer or officers for the "time acting for behoof of the said banking company, or upon "the drafts or orders or receipts to the said banking company, "or their cashier or cashiers, manager or other officers, of any "person or persons having letter or other sufficient written "authority of the said Elles, Hutcheson, and Company, in virtue "of the aforesaid credit, and also such sum or sums of money "as the said Elles, Hutcheson, and Company shall have become "liable, or stand engaged for, or be indebted, resting, and owing "to the said bank company, by or on account of any bills, "promissory-notes, letters of credit, guarantees or other obliga-

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"tions, or in any other manner of way whatsoever, but so as "not to exceed in all the foresaid sum of 750*l.* sterling of "principal, over and above what of the proper cash of the said "Elles, Hutcheson, and Company, may happen to be lodged in "the said cash-account;" and declared, that notwithstanding any change which might take place in the firm of the Glasgow and Ship Bank Company, the obligation should continue in force, "so long as the said Elles, Hutcheson, and Company shall con- "tinue to operate on the said credit, and to transact business "with the said banking company as for the time constituted."

It appeared from evidence not disputed by either of the parties, that the Glasgow Bank Company, in exercise of the option given to them by the deed of arrangement with Carrick, Brown, and Company, had declined to accept of debts and obligations owing to the latter firm to the amount of 349,961*l.* 15*s.* 6*d.*, and one of these debts was the amount owing by Elles upon the original cash-credit obtained by him from Carrick, Brown, and Company. The amount owing upon the credit, stated in Carrick, Brown, and Company's letter of 27th March, 1837, to be 817*l.* 10*s.*, continued owing, and, with the addition of interest to 13th October, 1837, was 838*l.* 7*s.* 1*d.*

On the 13th October, 1837, Elles drew out a draft for 750*l.* upon the credit which he had obtained from the Glasgow and Ship Bank. This draft, together with a sum of 88*l.* 7*s.* 1*d.* in cash, making together the balance due on the original cash-credit, he handed to the teller of the bank-office, in which the business of the Glasgow and Ship Bank was carried on. Entries of the transaction were thereupon made in the books of the Glasgow and Ship Bank, and of Carrick, Brown, and Co. In the former, Elles's account was debited with 750*l.* as drawn out, and in the latter his account was credited with 837*l.* 8*s.* 1*d.* as having been paid. And at the same time the original bond for the cash-credit with Carrick, Brown, and Co. was cancelled and delivered up to Elles.

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In November, 1840, the Glasgow and Ship Bank gave the appellant a charge upon the bond of the 6th October, 1837, for payment of 818*l.* 7*s.* 3*d.*, principal and interest, which was subsequently restricted to 409*l.* 3*s.* 7½*d.*, in consequence of a payment of the same amount from another of the sureties in the bond.

The state of the account by which the balance charged for was brought out, was shown by the following transcript of the account:

*Cr.* £750.

*Dr.* Messrs. Elles, Hutcheson, and Co., in Account with the Glasgow and Ship Bank Co. *Cr.*

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 1837. | | | | | 1837. | | | |
| Oct. | 13. | To cash, per dft. | £750 | 0 0 | Oct. | 31. | By cash, | £200 0 0 |
| Nov. | 2. | To | 50 | 0 0 | Nov. | 1. | By | 90 0 0 |
| | 3. | To | 240 | 0 0 | | 20. | By | 40 0 0 |
| | 21. | To | 20 | 0 0 | 1838. | | | |
| | 22. | To | 20 | 0 0 | April | 3. | By | 150 0 0 |
| 1838. | | | | | July | 12. | By | 400 0 0 |
| April | 4. | To | 150 | 0 0 | | 18. | By | 60 0 0 |
| July | 13. | To | 400 | 0 0 | | 23. | By | 90 0 0 |
| | 19. | To | 60 | 0 0 | Sept. | 18. | By | 170 0 0 |
| | 24. | To | 70 | 0 0 | | 21. | By | 100 0 0 |
| | 26. | To | 20 | 0 0 | Oct. | 3. | By | 50 0 0 |
| Sept. | 19. | To | 170 | 0 0 | | 5. | By | 50 0 0 |
| | 22. | To | 90 | 0 0 | Nov. | 27. | By | 100 0 0 |
| Oct. | 9. | To | 40 | 0 0 | | 30. | By balance, | 767 6 7 |
| | 10. | To | 70 | 0 0 | | | | |
| Nov. | 30. | To interest, | 37 | 6 7 | | | | |
| | | To cash, per dft. | 100 | 0 0 | | | | |
| | | | £2,287 | 6 7 | | | | £2,287 6 7 |
| Nov. | 30. | To balance, | £787 | 6 7 | 1839. | | | |
| 1839. | | | | | Jan. | 22. | By cash, | £ 37 6 7 |
| Mar. | 5. | To cash, | 150 | 0 0 | Mar. | 4. | By | 190 0 0 |
| | 6. | To | 40 | 0 0 | April | 19. | By | 100 0 0 |
| April | | To | 100 | 0 0 | | | By balance, | 818 7 3 |
| Oct. | 15 | To interest, | 29 | 6 2 | | | | |
| 1840. | | | | | | | | |
| Oct. | 15. | To do., | 39 | 1 1 | | | | |
| | | | £1,145 | 13 10 | | | | £1,145 13 10 |

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The appellant presented a suspension of the charge given him, in which he assigned the following reasons for the relief he asked:

"*Reas.* 14. At the time the complainer was induced to sign "the bond of caution, he was not aware that Peter Elles was "indebted either to the Ship Bank, or the new concern, to any "extent, and he was entirely ignorant that either of them had "claims against him exceeding the amount of the credit for 750*l.*, "which had been long past due, and for which repeated demands "had been made for payment, without effect. Neither was the "complainer aware, at the time he signed the bond, that Peter "Elles's brother had declined to become cautioner for him. "The chargers concealed all those circumstances from the know-"ledge of the complainer; and had he been aware of them, he "would not have become a party to the bond.

"*Reas.* 15. By the terms of the bond, the complainer and "the other obligants did not become bound, or intend to become "bound, for the amount of any cash-account or other debt "contracted by Elles previous to its date. On the contrary, the "bond was granted merely as a security for new advances to be "made to Elles by the Bank, to enable him to prosecute his "business; and it was upon this understanding that the com-"plainer was induced to become a party to the bond. The "chargers never informed the complainer of the real object for "which the cash-credit was intended to be applied by them; and "had they made a full and fair disclosure of the nature of their "claims against Elles, and the purposes for which the bond was "to be applied, he would never have signed it.

"*Reas.* 16. All the correspondence and negotiations with "Elles, as to the settlement of the old account, and the granting "of the new credit, were conducted by Mr. Rowand and Mr. "Galloway, and others acting for the new company as well as "the old, in the premises in Glassford-street, where the business "of the new company was carried on. The chargers had ac-"quired right to the old account, and the business of the old "company merged in the new concern.

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" *Reas.* 17. Whether the chargers had or had not acquired " right to the old account, they were well aware that the new " credit was to be granted and taken for the purpose of paying " off the old account, of which payment could not otherwise be " got. Accordingly, the chargers at once placed the whole " amount of the new account to the credit of the old account, or " it was so placed with their knowledge and approbation, with- " out the money ever having been paid to Elles. The object of " the chargers in this transaction was to make the complainer " liable, not for any new credit to be granted to Elles, but for " an old debt due by him previous to the date of the bond. This " was done without the complainer's knowledge or consent; and " no intimation of any kind was made to him when the amount " of the credit was exhausted by its being placed to the debit of " the new account, and to the credit of the old. It was not " till Elles had died insolvent that any communication was " made by the chargers to the complainer; and the circum- " stances above condescended on as to the nature of their trans- " actions with Elles have only recently come to the knowledge " of the complainer."

The respondents, while they did not admit the appellant's allegations, did not allege that they had made any communication to him of any kind in regard either to the original cash-credit, or the granting of the new one.

The appellant pleaded the following pleas in law:

" I. As Peter Elles was largely indebted to the bank under a " former cash-account, and had been repeatedly called upon to " make payment without effect, and as it was well known to the " chargers that he was unable to discharge this debt, and that his " brother had refused to become security for him, they were " bound to disclose these circumstances to the complainer at the " time he signed the bond charged on; and not having done so, " he is entirely liberated from his obligation.

" II. By the terms of the bond, the complainer and the

"other obligants only became bound for prospective advances to "be made to Peter Elles, or Elles, Hutcheson, and Company, "and not for any debt or cash-account previously contracted; and "as the balance claimed by the chargers has arisen entirely from "applying the new credit towards payment of the old cash-"account, they are not entitled to recover any part of it from the "complainer.

"III. At all events, as the complainer was induced to sign "the bond, in the belief that Peter Elles was not indebted to the "bank, and that the cash-credit was intended to be applied for "new advances, to enable him to prosecute his business as a "merchant, and as this was well known to the chargers at the "time he signed the bond, they were bound to acquaint him with "the nature of their claims against Elles, and the true purpose "for which the credit was intended to be applied; and having "failed to do so, they have no recourse against him.

"IV. The business of the Ship Bank having been merged in "the new concern, who acquired their debts; and all the corre-"spondence and negotiations as to the settlement of the old "account and the granting of the new credit having been con-"ducted by Mr. Rowand and others, acting on behalf of the "new company as well as the old, the chargers are bound by "their proceedings, whether the old account was transferred to, "or acquired by the new concern or not.

"V. Generally, the claims of the chargers, so far as they are "directed against the complainer, are illegal and unwarrantable; "and the charge ought to be *simpliciter* suspended."

The respondents, on the other hand, pleaded as follows:

"I. The complainer, as an obligant in the cash-credit bond "in question, is bound to repay the respondents whatever sums "were drawn by Elles, Hutcheson, and Company under that bond.

"II. The sum charged for having been *de facto* drawn by "Elles, Hutcheson, and Company under the bond in question, "the complainer is bound in reimbursement thereof.

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" III. The plea stated by the complainer in defence against " the charge, with regard to the *application* of the money after it " was drawn by Elles, Hutcheson, and Company, is irrelevant " and insufficient, inasmuch as this application, whatever it might " be, would not affect the liability of the cautioner for sums " actually drawn under the cash-credit.

" IV. The alleged application of the money is in itself of no " force to affect the complainer's responsibility.

" V. There is no sufficient ground set forth on which the " bond in question can be held to have become void against the " complainer. At all events, any plea going to set aside the bond " as from the first, could only be competently stated in a formal " process of reduction.

" VI. Generally, there is no ground of defence against the " charge given to the complainer, either relevantly stated or " truly existing."

The Lord Ordinary (*Cockburn*), on the 1st March, 1842, pronounced the following interlocutor, adding the subjoined note:

" The Lord Ordinary having heard parties and considered the " process, repels the reasons of suspension; finds the letters " orderly proceeded, and decerns: finds the chargers entitled to " expenses, appoints an account thereof to be given in, and when " lodged, remits to the auditor of Court to tax the same and " report.

" *Note.*—There can be no doubt that the general rule is, that " a creditor obtaining, and still more a creditor seeking caution " for his debtor, is bound to behave fairly to the proposed cau- " tioner. The question is, what is fair behaviour?

" *Quoad* the *original* debt the two banks were perfectly " separate parties at first; and under their contract of union they " remained separate, *in so far as this debt was concerned*, to the " last.

" In this situation the chargers were not bound, before " accepting of the suspender as cautioner, to let him know the

"fact, *that the acceptor owed* 750*l. to another bank,* assuming "them to have known this fact. If creditors were obliged to "tell every intending cautioner of every debt which they know "that their debtor owes, banks could scarcely ever take any "cautioner without some such intimation, for almost every "applicant for a cash-credit has debts. There is perhaps "not one cautioner out of a thousand who can require to be told "this.

"Nor is it any objection that the creditor believes that the "new loan is taken *in order to pay a pre-existing debt,* and that "he does not tell this to the cautioner. Can a bank not grant a "cash-credit without telling the cautioner that the credit is pro- "bably, or even certainly, taken with the view of diminishing "the debts of the person who gets it. The creditor has nothing "to do with the motives of the borrower.

"As little is it an objection that the bank saw the whole sum "in the credit drawn out, and applied by the borrower, even "under its own eye, and by a transfer in its own books, to pay "the former debt. It has no concern with the *use* which the "borrower may make of his own money.

"These circumstances, taken each by itself, therefore, or all "jointly, will not liberate the cautioner. Accordingly the "suspender does not merely state them as so many substan- "tive facts; but, *in argument,* he employs them as *evidence* that "the chargers *knew the debtor was greatly embarrassed,* and con- "cealed *this* to his injury. But no case of such *undue conceal- "ment* is raised on the record. It is stated, (as in Reason 14th,) "that the chargers failed to communicate certain detached pro- "ceedings which they knew had taken place between the debtor "and one of his creditors, viz., the Ship Bank; but there is *no "general charge of concealment of the debtor's being so distressed "that his state should have been disclosed.* Restricted as the "charge of concealment is, to a failure to communicate the "*detached facts sets forth,* the Lord Ordinary thinks it insuffi-

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" cient. It merely amounts to this, that the chargers, (who did " not *seek* the transaction or its cautioner,) knew, and did not " announce, that the borrower had a previous creditor, for whose " debt his brother refused to become security; that the new loan " was made for the purpose of paying off this prior debt, and that " the money was actually so applied. If these be brought for- " ward as what the chargers should have disclosed, the Lord " Ordinary does not think that they were bound to disclose " them; if, as *evidence* of further concealment, he does not think " that this evidence, (and none other is offered,) is sufficient."

The appellant reclaimed against this interlocutor, and on the 8th December, 1842, the Court pronounced the following interlocutor:

" The Lords having advised the reclaiming note for John " Hamilton, the suspender, against the interlocutor of Lord Cock- " burn, dated the 1st day of March last, together with the addi- " tional documents since produced, and heard parties procurators " thereon,—refuse the reclaiming note, and adhere to the inter- " locutor reclaimed against and decern: find the chargers entitled " to the additional expenses incurred by them."

The following opinions were delivered by the Judges at pronouncing this interlocutor:

" LORD JUSTICE-CLERK.—The first matter in this case is to " ascertain what are exactly the questions which are raised.

" These questions appear to me to be,—1. Whether the trans- " action for obtaining the new bond was managed by those for " whose conduct the United Bank are in the circumstance liable, " and whose knowledge must be regarded as the knowledge of " the United Bank? 2. Whether the true object of granting " the new bond was not solely a device to obtain payment of the " old debt, by getting the name of a new cautioner? and whether " the bank *sought* the transaction, (to use a phrase of the " Lord Ordinary,) in order to obtain payment of a bad debt? " 3. Whether, on the part of the debtor, the old cautioner and

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"the bank, it was not perfectly understood that the sum was "not to be at the command of Elles, to be drawn out in any "way he chose, but was to be drawn out solely to pay the old "debt,—so that the bond was required, and the credit was "given, exclusively for that object? 4. Whether, it being the "interest of those acting for the bank, and of part of the partners "of the bank, so to pay off the debt, by obtaining a new cau- "tioner, it was fair, honest, and righteous dealing on the part of "the bank, to take the obligation from the cautioner, such being "their object and interest, without communication of the pur- "pose to him,—that question involving the point, whether the "fact was one material for the cautioner to know, and for the "interest of the bank to conceal? I think these questions are "all raised by the record, and the averments of parties, especially "of the bank.

"I regard these as proper Jury questions. There have been "many cases so disposed of in regard to the duties of creditors "and cautioners. One extremely analogous to this was the "case between General Duff and the trustees of the late Henry "Erskine, sent to a Jury by Lord Mackenzie, as to the origin of "the bond of caution granted to them by General Duff, which "he averred was solely to pay off an existing debt,—the question "between the cautioners for an officer of a Montrose bank, and "the bank, as to negligence or concealment. There are various "other instances. One and all of the four questions which I "have stated are to be decided by inferences from facts,—from "the conduct and acts of parties, their relative position, and "motives and interests,—and, above all, on the view of what "was just, honest, and fair in the dealings between the parties. "On these matters, I think a Jury will come to a better conclu- "sion than we can do, especially on the question, whether the "conduct of the bank was fair and honest? I think the impor- "tance of so dealing with these questions arises eminently from "the superior fitness of a Jury to say, whether the acts com-

" plained of in such a case were fair and honest dealing between " the parties. Here it is that I think the element of the judg- " ment and opinion of a Jury is so important. Their estimate of " what is fair and honest between man and man is always more " direct, plain, and simple than the views of Courts of Justice, " who are apt to give too much weight to unsubstantial distinc- " tions as to the position of parties,—to notions of what men of " experience would have inquired into, and of the precautions " they would have taken, and to the effect of separate entries in " separate books and accounts, when the parties truly are all " one. Practically, and in plain language, I look on this as just " a question, whether, taking advantage of the names and un- " substantial distinction of the two banks, wholly unsubstantial " in *this* case, this was not just a juggle on the part of the bank " officers, with the knowledge and aid of the debtor, and of the " old cautioners, to entrap Hamilton into an obligation to pay " off Elles's old debt,—a juggle in which the real object and " manifest device ought to be kept solely in view, not the forms " and names of two establishments, two bonds, two apparent " credits, and operations in figures in two different accounts.

" I think the common sense and feelings of right and wrong " of a Jury will lead them in such a case to the truth much more " safely than we are likely to arrive at it.

" But I must repeat, that their estimate of, and judgment on " the case, I regard as a most important element in the right " administration of justice in such a cause. In an action on the " bond, this must have gone to a Jury in England, as Lord " Ellenborough said to Lord Eldon, in the course of the case of " Smith *v.* the Bank of Scotland; and I shall regret if the same " course is not taken here. If it is thought that we are to decide " it, I must look at the facts and conduct of parties as a jury- " man, and judge for myself in the best way I can. Attending, " then, to the facts so far as disclosed, it appears to me,—1. That " the bank knew that Elles could not pay the debt under the

"first bond, and had just reason to dread whether the cautioners "could pay, or had reasons for not pressing the cautioners. "2. That that was perfectly known very soon after the union of "the two banks, when the officers of each became the officers of "the United Bank, and to parties acting for the United Bank. "3. That, accordingly, the debt was rejected by the United "Bank, as one which they would not take, but which one por- "tion of the partners thereby became bound to pay to the others. "The suspender seemed to think it was for his interest to shew, "that the United Bank took the debt on themselves. I think "the fact is far more important for him that they rejected it as "a bad debt, after examination into the assets of Carrick, Brown, "and Company. 4. That the knowledge of the officers, mana- "gers, and secretaries at the two offices after the union, and "their acts, must be taken to be the knowledge and acts of the "officers of the United Bank, for such they all were; and that "the separation of chambers is merely part of the juggle they "are playing off. 5. That, accordingly, so early as 12th August, "1836, at the one office, and in the name of Carrick, Brown, "and Company,—but, in truth, with the sanction and authority "of the United Bank,—the following letter is written to Elles:— "'It being deemed necessary, in consequence of the junction of "'this bank with the Glasgow Bank, that the bonds of credit, "'and other obligations with these respective establishments, be "'either called up, or renewed in the name of the new firm, I "'am directed to intimate to you, on behalf of the Ship Bank, "'that no farther operations can be allowed on your cash-credit "'with them for 750*l*., and that the balance due by you under "'said credit must be paid up on or before the 1st September "'next. Waiting your reply, we are,' &c. This renewal in "the name of the new firm did not mean solely another paper "signed by the same parties, that is plain; for, on the two pre- "ceding pages, there was the demand for a new cautioner, and "proposals for a new obligant,—and so the answer shews that

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" Elles perfectly understood it. 6. That in writing this letter, " these officers acted in their real character, with the powers of " the Old and New Bank, and uniting these two for their own " interest, *i. e.*, for the interests of the partners of the Old, now " one half of the New Bank. 7. That the proposal originated " with the bank officers, and must be taken as the joint act of " the Old and New Bank; the latter lending themselves to the " former, just in respect of the plain interest they had to relieve " their own partners of the necessity of paying this debt. " Carrick, Brown, and Company were no longer entitled to " carry on any banking business. The new bond which, by " letter in their name, was proposed, was for a credit with the " new company, and in Rowand's character as manager for the " new company, in order to pay off what one half of the new " company owed to the other half. 8. That the plan was one " to pay the old debt; not to give new and additional credit. " 9. That it was a plain part of that plan on the part of the " bank to get a new *cautioner*,—for they declined to give the " credit till they got a new cautioner,—knowing Elles to be " worth nothing, and doubting the old cautioners. 10. So fully " was the matter understood, that neither Elles nor the bank " ever dreamt of *attending to the names of the New Bank as* " *separate from the Old*, even as to the new credit. *The bank* is " used even when the New Bank was in view. 11. The whole " thing is managed in the name of Carrick, Brown, and Com- " pany; nay, the letter, sending the bond for a new credit with " the New Bank for signature, is in the name of Carrick, Brown, " and Company, though that was the act of the New Bank, if " the difference between the two establishments had in truth, in " substance, been attended to, or had been of practical mate- " riality in the case. 12. Elles had made no proposal to the " United Bank, nor received any letter agreeing to give new " credit from that New Bank, on the theory that they were " separate. 13. Then there are only two suppositions: (1.) That

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"these officers of the United Bank acted for the latter as well "as for the old throughout, so that, for their conduct, acts, and "and knowledge, both are equally responsible; or, (2.) That "the form was gone through of Carrick, Brown, and Company, "saying to the United Bank,—Here you have rejected this debt "of Elles,—he cannot pay,—we doubt, or don't wish to press "his cautioners,—it may fall on us, who are you; now, will "you, being us in a different character, take a new bond with a "different obligant, who shall know nothing of the matter, and "so let us pay the debt by carrying it at once to his account? "Either supposition makes the chargers answerable for the con- "duct of those who carried through the transaction. 14. That no "additional obligation for Elles was undertaken by the old cau- "tioner; and that he knew perfectly that the amount of this "new bond was to be applied to pay off the old to his own relief, "and to the account of the new cautioner; and would not have "signed on any other footing, or have incurred a second obliga- "tion for other 750*l.* Hence, as to him, the transaction consti- "tuted a form, a mere form, but one by which he knew that he "would at once be relieved of half his existing obligation. "15. That the bank would not have given Elles the money in "any other way, or for any other purpose; and would have "broken faith with Anderson if they had, even if their own "interest had not coincided with his. This is, I think, an im- "portant point of fact,—so the bank felt by their statement on "the record; and, I own, my inferences from the whole charac- "ter of the facts is, that the bank would have laughed Elles to "scorn if he had proposed anything else. 16. That the officers "and partners of the United Bank,—all who had been of "Carrick, Brown, and Company, and the others indirectly, as "interested in relieving the former,—had an interest in paying off "the old debt by the name and obligation of Hamilton, and, in "fact, were paying their own debt; and, even on the most "favourable view, that the New Bank, knowing the fraud, lent

" themselves to the deception practised on Hamilton. 17. That " they had an interest to conceal the character and object of the " transaction, and the end in which alone the plan of the new " bond originated. 18. That the fact so concealed, and which " the bank had an interest to conceal, was a material fact for " Hamilton to know, as I am confident he would not have " signed the bond if the fact had been disclosed. These eighteen " propositions, in fact, I think, are made out fully to my satis- " faction; as a juryman, I should so specially find.

" Then look to the result. As soon as the bond is signed, an " operation goes on simultaneously in the books of the two banks, " wiping the debt out of the one, and entering it in another " account in the name of the New Bank against Hamilton, for " whose obligation alone the whole thing was gone through. Is " this honest? Is this fair and righteous? I think not. I think " Hamilton was, by an act to which the New Bank were parties, " of which, through their officers, they were cognizant, and in " which a large portion of their partners had an interest, unfairly " entrapped by undue concealment into a transaction, which, if " he had not been deceived, he would not have entered into, and " of which he ought to be relieved. As to the duty of com- " munication, I apprehend the principle, so far as it need be " stated for this case, is very simple: That wherever there is, on " the one side, an interest to conceal; wherever there is the " knowledge of an unfair end by parties with whom the creditor " is either identified, or whom he desires and has an interest to " aid and favour,—there is also the duty of communication; " and, on the other side, the right to expect such communication. " The duty of communication is an obligation in point of fair- " ness and honesty. That is its legal test in such a case as the " present.

" I give no opinion on a variety of cases put to us, as to what " might be competent as to paying off other debts by operations " on new accounts. 1st, These cases are not before us. 2nd, The

"slightest variation in the facts may take such cases wholly out "of the character which belongs to this transaction; in particu- "lar, whether the bank sought the transaction? The Lord "Ordinary says they did not. Now, they actually proposed it, "and used demands for payment in order to obtain it. I think "they sought it. 3rd, The question in all such cases will still "be,—1. Whether the transaction is honest? 2. Whether it is "in the usual course of business? And that, as in the important "case of Blincow, in this Court, is a proper Jury question.

"This leads me to advert to the point, much pressed upon "us, as to the frequency among bankers of transactions said to "be the same as the present. 1. I see no averment on record as "to any practice of bankers on the subject; and it would have "been very strange if there had. 2. If relevantly made, that "ought to be the subject of trial, and cannot competently be "introduced into the case in any other way. I think the whole "matter is plainly irrelevant. The practice of bankers may be "material as to the rules of business, the ordinary course of "settling transactions, and many other questions, where they "have no interest except perhaps that of convenience and regu- "larity in business.

"But in a question as to the obligation by those taking such "a bond towards cautioners, I deny that any practice could be "appealed to in support of a transaction unfair in point of actual "dealing and open conduct with the particular individual in "question, or could affect the issue raised in the case.

"In such a case as this, I must regard as wholly inadmis- "sible in judicial consideration, any practice, or rather I should "say, practices of bankers. It would be most hazardous to "admit questions of this character to be influenced by what "bankers *may do* for their own interest, and to avoid loss. They "have a great deal in their power in circumstances similar to "the present: the parties are greatly under their control,—they "run such risks that the temptations they are exposed to are

" very great to get the means of covering themselves against " loss; and the reported cases we have had as to what *will* be " done, seemingly as matter of course, in many such cases of " undue concealment or gross fraud, *e. g.*, Smith *v.* Bank of Scot- " land, the Leith Bank cases, the Montrose Bank, the Perth " Bank, and many others, shew how little dependence can " possibly be placed on the practices of bankers. This matter, " then,—not raised on the record, and which if it had, and had " been relevant, must have been duly investigated,—I hold it to " be quite incompetent to refer to. If it were proved to me that " there were five hundred cases where banks had, in circum- " stances similar to the present, got new cautioners involved in " obligations in order to pay off bad debts, which the banks " could not otherwise recover, I should only say it was high " time that courts of justice should correct the morality of " bankers.

" I am very well aware that there was great room for the " observation, in the House of Lords, that the Scotch Courts had " mistaken some of the original observations made in that House " as to the duties towards cautioners; and that some judgments " had been pronounced which relieved the cautioner from the " responsibility which he undertook, in truth, in the very cases " for which his cautionary obligation was undertaken, viz., con- " tinued misconduct, negligence or embezzlement by the obligant.

" But the original case in the House of Lords, Smith against " the Bank of Scotland, gave no countenance whatever for the " mistake that certainly was fallen into; for Lord Eldon in " that case, with his usual caution and great discrimination, " drew the distinction most pointedly between the facts which " occurred before the bond was granted, and during the period " to which it applied. In that case he held it to be relevant, " that, though the bond applied to past transactions, yet it " *was truly intended* to apply to a debt previously due and known " to the bank, but not stated to the cautioners.

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"It is said that there is a great difference between this case "and that of a bank dealing with the cautioners for a bank "agent. I see none as to the *principle* applicable to the case, "though great distinction in the facts that may prove a case "*against* the bank. Wherever it is the interest on one side to "conceal facts material for the other to know, and where, owing "to such conduct, the party is led into an obligation which he "would not otherwise undertake; *there* I think was the duty "and necessity of communication, and there also was undue "concealment.

"Accordingly, both Lord Eldon and Lord Redesdale decided "the case of Smith on the broad ground of honest and fair deal- "ing. And so, when it came ultimately before this Court on "the last occasion, on the facts allowed to be proved by the first "judgment of the House of Lords, in 1813, the Court proceeded "upon the general ground I have stated, and not on the pecu- "liarity that the bond was for an officer of the bank. The Lord "Justice General held, that if the bond was truly *intended* for a "past debt, it was relevant to inquire if that material fact was "concealed. So also, in a very instructive opinion by Lord "Pitmilly, he rests his judgment wholly on the principle I have "stated. He says,—'The legal principles which must guide us "'in such a case, are very briefly and emphatically described in "'the judgment of the House of Lords. Is the bond liable to "'reduction, as "unduly obtained by concealment or deception?" "'understanding by "concealment," (as explained in the speech "'of the Lord Chancellor,) the concealment of facts which, with "'a view to the transaction in question, it would be for the ad- "'vantage of the one party that the other was ignorant of. Let "'these principles be applied to the present case.' And in an- "other part of his opinion, he quoted the well-known judgment "of Lord Mansfield, in the insurance case of Carter *v.* Boehn, as "stating the extent and nature of the duty of communication. "No one is disposed to go farther than I am in holding, that,

" after the bond is granted, the cautioners are bound to inquire " as to the conduct of the party for whom they undertook, " although even then there are certain duties to be observed by " the creditor; and I could not have concurred in the judgment " in the case of M'Taggart, afterwards reversed, and some others, " the principle of which must be held to be subverted by the " remarks of Lords Brougham and Cottenham. But the ques- " tion as to the *manner of obtaining the bond* is perfectly distinct, " and remains on the principles settled by the case of Smith.

" Whether there has been negligence on the part of the " creditor, even after the bond was granted, and undue conceal- " ment of facts known to him during the currency of the obliga- " tion, which he ought to have communicated, may be very much " an inference in point of law as to his duties and legal obliga- " tion. Yet, even *that* question, a much more delicate one than " any which arises here, has been sent to be tried, as in the case " of Hill *v.* Birnie, and other cases.

" But the question, whether the bond was at first unduly " obtained by concealment or deception, is the most purely Jury " question I can conceive, and one which I think a Jury are " much better judges of than the Court. That question has been " frequently entertained in a suspension.

" I am of opinion that this bond was unduly obtained from " the reclaimer, by concealment or deception, to which the " chargers were parties, and for which they are in law respon- " sible."

" LORD MEDWYN.—The view taken of this case by your " Lordship makes it a most important case indeed. The facts " are these.—(*His Lordship recapitulated the facts of the case*).— " The first bond obtained by Elles from Carrick, Brown, and " Company, is delivered up; the balance under it is paid; there " can be no longer any claim under it, and the objection that the " last bond was not to cover any prior debt, but that it was for

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"future contractions, and moreover that it should not have been "paid by the new firm to discharge the debt due to Carrick, "Brown, and Company, applies as much to Anderson as to his "co-obligant the suspender.

"These two are the defences urged in the suspension against "payment, and they must be disposed of according to their own "merits, and not according to the private view taken of them by "a party who may be in the same situation as the suspender. "Now, it is not alleged that the new company insisted upon this "sum being drawn out and applied to pay the sum due under "the former bond. It is true that Carrick, Brown, and Com- "pany had applied to have the amount paid up, and afterwards "renewed the cash-credit upon getting the additional security of "the suspender for the new firm, the debtor apparently not being "able to pay it up. But was there anything objectionable in Elles "making this draft, and applying it to discharge the old debt? "I cannot see that there was. It was said that the obvious "meaning of such a transaction is to apply to future transactions "for the benefit of the debtor, to be used by him as a fund of "credit, which may enable him to carry on his business, and by "his success in his future dealings, to afford the means of dis- "charging the debt contracted under the cash-credit; and that a "cautioner is entitled to presume that this will be the course of "dealing under it. Now, I do not apprehend that there is any "such understanding as to the use to be made of the credit "obtained under such a cash-bond, that the party cannot apply "the sum he may draw to pay off an old debt, or that it is illegal "for him to do so, even if it be to pay an old debt to the "bank who grants the credit, or if applied to pay a debt to a "party connected with, or identified with the bank. If the "cautioner wished to limit the application of the money obtained "under such a bond, he would have to stipulate this with his "principal, and secure himself by some private obligation or "penalty against failure to comply with it. For I hold that the

" bank is neither bound nor entitled to inquire into the applica-
" tion of the drafts made upon a cash-credit which they may
" have granted; that the party is the best judge of how he ought
" to apply his cash-credit, and that, having granted the credit, the
" bank is bound to answer the draft without inquiry. In like
" manner they cannot be called upon to refuse payment if he
" wishes to apply it in paying a debt due to themselves. This
" may be the most judicious use to make of it. The bank might
" charge upon the bond, and so affect the debtor. The bank
" may be the only creditor who has diligence ready. It may be
" of the utmost consequence to get this creditor's interest removed
" out of the way. This may be the only obstacle to his carrying
" on a lucrative trade. In fact, in this case, it was intimated,
" by a letter of 12th August, 1836, that the new bond being to
" be substituted for the old one, it was to be delivered up, and
" the old account closed, and this must be done whenever cash
" cannot be immediately paid by an operation in the books of the
" bank, debiting the new account with the amount, and crediting
" the old account with the same, and so closing the former
" account. This is the ordinary course of dealing even when
" both bonds are to the same bank, and where the old is no
" longer to be operated on, but delivered up to the obligants in it.
" It was exactly what was done here; and I see nothing in this
" operation on the part of the bank which the cautioner can
" object to.

" But, again, it is said, that the bank did not give the sus-
" pender all the information they should have done; that they
" should have mentioned the particulars of his debt under the
" former bond. Now, with great submission, I do not hold that
" the bank was bound, or entitled even, to give such information
" to the proposed cautioner. A banker does not, and ought not
" to hold himself at liberty to give information of the state of any
" customer's transactions to any inquirer. And if any person
" should come to a bank, and state that he had been applied to

"by such a person to be cautioner for him to the bank, and "that he wished to know how his account stood, or whether he "was regular or otherwise in his dealings with the bank, the "banker would not feel himself entitled to give this information, "without due authority from the party; and he would desire the "proposed cautioner to bring this authority to him, and he would "then be bound to furnish all the information in his power, and "a failure to do so correctly would unquestionably liberate the "cautioner. It is easy to see how easy it would be for any one "who would wish to obtain information as to the credit and "dealings of a trader, to pretend that he was to be cautioner for "him, and the disclosure might be most prejudicial. It is not "alleged that, in the present case, the suspender applied for any "such information, or ever made any inquiry even at the prin- "cipal, still less ever came in contact with the bank, during the "negotiation with the debtor, which resulted in his undertaking "to be bound in this cash-credit bond. The transaction was just "the ordinary one—the bank called upon their debtor to pay up "the balance due, or find additional security. He chose the "latter alternative, and proposed the suspender,—he is accepted, "—and the debtor gets the bond subscribed by him without the "bank ever having any communication with him. The cau- "tioner is presumed to have made all the inquiries he thought "necessary of his principal, because he requests none from the "bank, and the bank is entitled to rely that this is so, and is safe "in answering the draft of the principal on the cash-account, and "in applying it in the manner he desires.

"The case of a bank agent is quite different from the present, "and the principles which have been applied to that state of "facts, and that relation between the parties, must not be held "to regulate such a question as this. The bank agent is the "servant of the bank, and in all the cases which have occurred "where the cautioner has been liberated, the misconduct of the "agent has been such that the bank ought to have dismissed

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" him. If the obligation in the bond is unlimited, as is often " the case, the debt allowed to be incurred has arisen from gross " negligence on the part of the bank, and to an extent far beyond " what could have been contemplated; and even when the obli- " gation is limited, the excess of debt beyond this sum has " always been so great as to preclude all hope of the agent being " able to retrieve his affairs. This has always been an element " in these cases, and a most important element, as greatly affect- " ing the risk and responsibility of the co-obligant; and, accord- " ingly, in such a case it has been held that the bank ought to " have given information as to how the agent stands with the " bank, and the course of his management, which requires this " additional security, otherwise that the bank does not act fairly " with the co-obligant, and the contract binding him shall be " void. The agent will not be disposed to expose his delin- " quencies, and perhaps is not entitled to lay open so much of " the bank's affairs. The bank, on the other hand, is held bound " to explain the state of their agent's transactions in their busi- " ness. It is their own account, and they betray no confidence " in explaining it to the proposed cautioner before he becomes " bound for malversations, which the negligence perhaps of the " bank has permitted to a great amount, and of which it would " be unjust if the bankers would relieve themselves by involving " an innocent party, by concealing facts which would certainly " have prevented the obligation being incurred where a hopeless " undertaking for many thousand pounds, lost irretrievably, is " incurred. All this plainly distinguishes such a case from the " present, where the obligation is for a very limited extent; " where it must be seen that the principal requires credit to that " extent; and where no inquiry is made except of him, it must " be presumed that the cautioner chooses to trust his represen- " tation, that this sum will be useful to him, and leaves it to him " to apply it in the manner he thinks most beneficial, either in " discharging an old claim against him,—thus saving his credit

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"and enabling him to continue his business unembarrassed with "it,—or in using it as a direct fund of credit to operate upon in "future. I am, therefore, for adhering to this interlocutor."

"LORD MEADOWBANK.—This opinion confirms the one which "I before held. I cannot doubt that the interlocutor ought to "be adhered to. Nothing can be more prejudicial than to upset "the practice of traders as to matters of this sort. And I have "not a doubt that, in ninety-nine cases out of a hundred where "a bank credit is renewed, new co-obligants are never informed "of the state of the principal's previous credits. Many traders "never suppose that they are entitled to receive such informa- "tion. When a bank writes to a customer that they will not "allow him to draw further unless he grants a new bond, in "most cases it is understood that this is for the purpose of pay- "ing up the old bond. It would have made no alteration in my "mind in the present case if it had been the same bank all "along."

"LORD MONCREIFF.—I will not say that there may not be "ground for hesitation in this case, from the peculiar position of "the parties. But I am of opinion that the interlocutor of the "Lord Ordinary is right in principle, and that there would be "great danger in departing from that principle.

"The case is that of a simple bond of caution to a bank for a "cash-credit. It is proposed to the bank that they should grant "a credit to Elles and Company, upon certain security to be "found. That bank, the new establishment of the Glasgow and "Ship Bank, were asking nothing of Elles, but certainly nothing "of Mr. Hamilton, the party here. He is proposed to them as "a cautioner, or rather a co-obligant, by a third party, over "whom they have no control, and they agree to accept of him, "having no occasion to have any communication with or on "account of him, except to ascertain that his credit is sufficient.

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" Elles is no servant or agent of the bank, over whose proceed-
" ings they are bound to exercise a superintendence. He is a
" stranger customer, who has happened to do business with one
" of the former companies, and who desires to have a credit with
" the united company.

" The whole theory of the suspender was on the assumption
" that, in such a case, it was the duty of the bank specially to
" communicate with him, and to inform him of every difficulty
" in the circumstances of his principal, Elles. There is a radical
" fallacy in this reasoning. The bank had nothing to do with
" the suspender till he was proposed to them as a cautioner or
" co-obligant, and then it lay with him, not with them, to ascer-
" tain the state of his own friend, Elles, and if he saw cause, to
" make inquiry into his circumstances and his dealings with the
" bank. He was a stranger to the bank. But so was Elles in
" any legal sense, being no servant of the bank.

" I understand it not to be disputed, that the circumstance of
" the bank, or any of its partners, knowing that the person
" asking the credit has other debts, or even that he is taking the
" credit merely for the purpose of liquidating or managing them,
" would be no objection to the validity of the cautioner's obliga-
" tion, though no communication had been made of the existence
" of such debts. The presumption is, that he inquires and is
" informed of all that is necessary for his guidance by the gentle-
" man who tenders him as his cautioner. It would put an entire
" end to this branch of trade if such necessity were imposed on
" the bank. He is an adverse party negotiating with them, and
" in direct connexion with the principal obligant, and ought to
" satisfy himself of every such matter: and indeed it is obvious
" that the bank, imperfect as its information of the circumstances
" may be, would commit a great irregularity if it were officiously
" to intrude a communication on the subject on the friends of
" their customer, at least where no inquiry is made of them. If
" it were made, I doubt if they could without the consent of the
" principal.

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"As this case stands, this is the real state of the matter. "For it is quite clear, as matter of fact, that the prior debt, for "paying which it is said this credit was asked, was not due to "the new bank, the only party here, but to the Ship Bank, as a "separate concern, and was never assumed as a debt by the "United Bank; and it really evinces the consciousness of the "defender of the importance of this fact, that, throughout the "record, he tries to withhold any admission of it, and to insinu- "ate that the debt was fully adopted, although it is now quite "clear that it was not.

"But would it make any real difference if it were the case of "a debt due to the bank itself? I think that it would make an "important difference in the argument, as rendering the plea "against the bank more plausible or probable. But I am far "from thinking that, even in that case, it would be sound or "conclusive; for I believe it to be not a very uncommon occur- "rence for a bank, who have gone on for a time giving credit to "a customer, to require security before going further; and it "would appear a strange thing to me that they should be made "to forfeit the benefit of any security voluntarily tendered to "them, merely because they do not ultroneously force upon the "cautioner proposed a disclosure of all the dealings of his own "friend, whose condition he is bound to know when he asks "the bank, on his security, to give the credit asked. This is "totally and fundamentally different from the case of an officer "or servant of the bank itself. If such an officer has miscon- "ducted himself in a way which they know cannot be ascer- "tained by other parties, they cannot, in dealing with others in "regard to his responsibility, deceive them by the shew of con- "fidence in still retaining him in their employment and credit. "But in the other case, they are merely dealing with a customer "in apparently solvent circumstances, and it lies with those who "think him worthy of such trust and credit as to join in solicit- "ing for him the aid of a bank for the time, to satisfy themselves

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" as to the use which he may make of the credit to be given, an
" of his general correctness in trade or business.

" The thing which was transacted in the present case i
" thought to be very extraordinary. It is no doubt a little pecu
" liar, from the circumstance of the union of the banks, an
" the identity of some of the partners of the Ship Bank wit
" those of the United Bank. But in itself—in its elements—i
" is a very ordinary case.

" To judge of this correctly, it is necessary to look closel
" to the record. There is no averment of fraud or deception
" Not even that Elles was laid under any obligation to appl
" the money to be drawn on credit in any particular manne
" Neither is it averred that Mr. Hamilton had any personal com
" munication with the bank ; that they made any positive repre
" sentation to him, or that he made any inquiry of them. Th
" utmost of the statement is in Articles 14, 15. In so far a
" these articles consist of proper statements of fact, they jus
" amount to this, that the defender was ignorant that Elle
" owed a debt to the Ship Bank, and that the New Bank di
" not communicate the fact to him. There is indeed an addi
" tional averment, that the bank did not inform him that Elles'
" brother had declined to be cautioner. This appears to me t
" render the plea altogether extravagant. The bank would, i
" my apprehension, have done a very improper thing if they ha
" made any such communication. Mr. Elles was still in goo
" credit, and carrying on an extensive trade, notwithstandin
" that he had not found it convenient to withdraw so much c
" his capital from the trade as to pay up the sum due to the Shi
" Bank. Was it for the bank to publish to the world wha
" they might know of this friend or that, of such a trader, havin
" for his own private reasons, (perhaps originating in his ow
" circumstances, and not in any distrust of Elles,) declined t
" become security in such a credit? But above all, were the
" under a legal obligation to make such a communication unde

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"pain of forfeiture of their bond, to another friend of Elles who "voluntarily offered his security, and who must be presumed to "have obtained from him all the information which was neces- "sary to guide his judgment? It seems to me that, to suppose "such an obligation would be an entire inversion of the relative "position of the parties. Even on the facts appearing, it was "an account which went on with debit and credit for a very "considerable time. Between the date of the bond and the "12th July, 1838, 1250*l.* were paid in. What is the case but a very "ordinary one, of a cautioner or co-obligant in such a bond, after "the bankruptcy of the principal and a balance ensuing, object- "ing because he did not know of all his friend's difficulties? "True no credit was given beyond 750*l.*, and there was no "cautioner beyond that. But the credit went on to that amount "till October, 1840. In the case of insurance, the obligation "is the other way. The proposal is by the insured, the obliga- "tion by the insurer."

*Mr. G. Turner* and *Mr. James Anderson*, for the Appellant.—1. The partners and managers of Carrick, Brown, and Co. became partners and managers in the United Bank. These parties were cognisant of how the original credit had been acted upon, of the demand for payment on additional security, and that the brother of the debtor had refused to become such security.

Moreover the business, including the winding up of Carrick and Co.'s affairs, was conducted in one and the same premises. For all purposes, therefore, the New Bank must be held to have been cognisant of what had passed in regard to the original credit from Carrick and Co., and of the application intended to be made with the money to be advanced upon the new credit. If this were otherwise doubtful, it is made certain by the letters addressed in the name of Carrick and Co., which ask for a renewal of the security for the new firm, and otherwise treating the old and the new firm as having one interest.

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II. The transaction to which the appellant was a party, was giving Elles a cash credit for the carrying on of his business, but the dealings between him and the bank show that this was neither done nor intended, and that the true object of the parties was to pay off what was owing on the original cash credit. The facts, in short, show a precontract between the Glasgow and Ship Bank and Elles, that the money advanced on the credit should be applied to payment of the pre-existing debt due by Elles to Carrick, Brown, and Co. Such a precontract was a perversion of the liability come under by the appellant and ought to have been communicated to him, that he might judge for himself whether he would be a party to it, but no such communication was made to the appellant.

[*Lord Chancellor.*—There is no averment on the record of any agreement as to the particular application of the money.]

The averments are not very precise, but they are equivalent to such an averment; and the facts are proved from which such an agreement is to be deduced. On the 13th October, Elles drew a cheque for the whole amount of the new credit; that cheque he handed to the teller of the Glasgow and Ship Bank, through whom the amount of it was passed to the credit of Elles in the books of Carrick, Brown, and Co. It is impossible to suppose that the Glasgow and Ship Bank could have been ignorant of the intended application. Neither can it be said that they had no interest in the particular application; for looking at the very large amount of obligations which they had an option to adopt or reject as part of the assets of Carrick, Brown, and Co., the amount of which they had given credit for in account, it is evident that they had a very material interest to see to the realization of these liabilities; accordingly, Rowand, who was the manager of the new, as he had been of the old concern, asks a renewal of the security in the name of the new firm. It is proper, therefore, at least, that an inquiry should be allowed, to ascertain how far there was fraud in obtaining the new security

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without making the surety aware either of what had previously passed, or of what was intended. But the judgment below was made without any such inquiry, in the face of the existing evidence, which shews that the Bank refused the new credit until they found their hopes of realising payment of the debt on the original credit to be desperate, when, and not till then, they gave the new credit. The injury to the appellant by the course adopted is evident; for in all probability, had he obtained the knowledge which was withheld, he would have refused to give his liability; or, at all events, he might have obtained an assignation to the previous bond under which he could have had recourse against Dewar's representatives; whereas, by the course which was adopted, they had been allowed to go free.

In Pidcock *v.* Bishop, 3 *Bar.* & *Cr.* 605, it was found that a stipulation, that part of the price of a sale should be applied to the discharge of a debt, owing by the purchaser to one of the vendors, vitiated the obligation of a surety for payment of the price. In the present case, assuming the two banks to be separate bodies, the new credit was for the purpose of paying off the debt of some of the partners. In Stone *v.* Compton, 5 *Bing. N. C.* 142, it was held that a surety for payment of a sum to be advanced on mortgage, was liberated by the fact, that part of the money was, without his knowledge, retained by the lender in payment of a pre-existing debt; and upon the ground that, but for the misrepresentation that the whole money had been advanced, the surety would never have made himself liable; so here, if the appellant had known that his liability was not to benefit Elles in the carrying on of his business, which might or not be profitable, which was all that appeared on the face of the bond, but merely to enable him to pay off an old debt, *non-constat* that the appellant would have put his name to the bond. The principle is, that the surety must have an opportunity of judging for himself; and that in that view, it is immaterial whether the facts not communicated are of importance or not.

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That was ruled in Bonsor *v.* Cox, 4 *Bea.* 379, and was still more conclusively recognised in a case lately decided in this House, Railton *v.* Matthews, 3 *Bell,* as it had previously been in Smith *v.* Bank of Scotland, 5 *W.* & *Sh.* 703.

[*Lord Campbell.*—The case of an agent can have no application here.]

LORD CHANCELLOR.—My Lords, I have already stated during the argument, that I considered that there was no averment as to the mode in which the money was intended to be applied; and I have stated the substance of the opinion which I entertain upon this point, that the mere circumstance of the parties supposing that the money was intended to be applied to a particular purpose, and that it was evidently intended to be so applied, does not appear to me to vitiate the transaction at all. If there was a stipulation that it was to be so applied, and these were the conditions upon which the money was advanced, it might have affected the transaction. But in order to raise that question, there should have been an averment upon the record that such an agreement had been entered into. In the absence of any such averment, I think the parties are not in a condition to rest their case upon such an agreement; and therefore I think the judgment ought to be sustained.

LORD BROUGHAM.—My Lords, I am of the same opinion, and I have never entertained any doubt from the beginning. It is neither averred, nor supposed to be averred, nor put so, and the party, the real creditor, the bank, in these circumstances was not bound to volunteer a disclosure of any transaction that passed between them and the other party.

LORD CAMPBELL.—My Lords, I am of the same opinion. Your Lordships must particularly notice what the nature of the contract is. It is suretiship upon a cash-account. Now, the

question is, what upon entering into such a contract ought to be disclosed, and I will venture to say, if your Lordships were to adopt the principles laid down and contended for by Mr. Anderson at the bar here, that you would entirely knock up those transactions in Scotland of giving security upon a cash-account, because no bank would rest satisfied that they had a security for the advance they made, if, as it is contended, it is essentially necessary that everything should be disclosed by the creditor that is material for the surety to know. Then it would be indispensably necessary for the bank, to whom the security is to be given, to state how the account has been kept, whether the debtor was in the habit of overdrawing, whether he was punctual in his dealings, whether he performed his promises in an honourable manner; all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretiship is to be given, to make any such disclosure. A I should think that this might be considered as the criterion, whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might naturally expect. And if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires. Now, in this case, assuming that there had been the contract contended for, and that had been concealed, that would have vitiated the suretiship. There is no proof that there was any such contract, and there is no allegation that there was any such contract. Therefore there is neither allegation nor proof, and what does it rest

upon? It rests merely upon this, that at most there was a concealment by the bank of the former debt, and of their expectation that if this new surety was given it was probable that the debt would be paid off. It rests merely upon non-disclosure or concealment. And if you were to say that such a concealment would vitiate the suretiship given, on that account, your Lordships would utterly destroy that most beneficial mode of dealing with accounts in Scotland.

LORD BROUGHAM.—I am not at all clear, (though it is quite immaterial,) that the surety would have acted differently if he had known of it. That has been taken for granted all the while.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

DEANS, DUNLOP, and HOPE—GRAHAME, MONCREIFF, and WEEMS, Agents.

[Heard 6*th March*. Judgment, 17*th April*, 1845.]

CAPTAIN THOMAS MACINTOSH and DAVID NIGHT, by Attorney, *Appellants.*

JANE GORDON OF MACINTOSH, and KENNETH MACKENZIE, *Respondents.*

*Fee.—Life-Rent and Fee.*—The reputed father of a natural child, in contemplation of her marriage, granted a bond for a sum of money payable to her in life-rent, excluding her husband's *jus mariti*, and to the children of the marriage in fee, and failing issue of the marriage to the husband in fee after the issue had failed, *held*, that the fee was in the wife.

ON the 27th of July, 1825, Alexander, Duke of Gordon, in contemplation of the marriage of the respondent, his natural daughter, with Lachlan Macintosh, and for love, favour, and affection to her granted a bond, whereby he bound himself, and his heirs, executors, and successors, "to make payment to the said "Jane Gordon, at the first term of Whitsunday or Martinmas "after the said intended marriage, of the sum of 5000*l.* sterling, "and that to the said Jane Gordon in life-rent, during all the "days of her lifetime, secluding the *jus mariti* of the said Lach-"lan Macintosh, her intended husband, and to the children to "be procreated of the said intended marriage in fee, and that in "such proportions as the said Jane Gordon and Lachlan Mac-"intosh shall appoint by any writing under their hands, and "failing thereof, to the said children equally among them, share "and share alike, or failing issue of the said intended marriage, "then to the said Lachlan Macintosh in fee: And farther, I do "by these presents bind and oblige myself, and my foresaids, to "make payment to the said Jane Gordon, during all the days of "her lifetime, secluding the *jus mariti* of the said Lachlan Mac-

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" intosh, of a free life-rent annuity of 200*l.* sterling per annum, " payable half-yearly, commencing at the first term of Whit- " sunday or Martinmas, which shall happen one year after the " date of the said intended marriage, and so forth thereafter half- " yearly, at each term of Whitsunday and Martinmas, during " the lifetime of the said Jane Gordon, with a fifth-part more of " the said annuity of liquidate penalty for each term's failure in " payment thereof, declaring that the said annuity, and also the " interest on the foresaid sum of 5000*l.* sterling, shall be payable " upon the receipt of the said Jane Gordon alone during her life- " time, and declaring also that in case I, the said Duke, or my " foresaids, shall incline to pay up the foresaid sum of 5000*l.*, " we shall be entitled to do so at any term of Whitsunday or " Martinmas, on giving six months' notice to that effect; and in " that event the foresaid sum of 5000*l.* shall be again lent out " and reinvested on good and sufficient security, at the sight and " to the satisfaction of the Most Noble George, Marquis of " Huntly, Adam Gordon, Esquire, of Newton, and Captain " John Anderson of Candacraig, or the survivor or survivors of " them, the security to be taken in the same terms as are above " expressed."

The right to the money provided by this bond was contested between the respondent, the widow of Lachlan Macintosh, and the appellant, his brother, in a multiple-poinding raised by the latter for that purpose, and under the circumstances detailed in the following interlocutor, pronounced by the Lord Ordinary, (*Cuninghame,*) to which he added the subjoined note. After finding the granting of the bond and its terms, as already set out, the interlocutor proceeded thus:—

" Finds that the said Lachlan Macintosh was, soon after " the date of the said bond, married to the said Jane Gordon; " but that it does not appear, from any documents produced or " otherwise, that he made any settlement on his spouse on that " occasion: Finds, that notwithstanding the seclusion of his *jus*

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"*mariti*, contained in the said bond, the said Lachlan Macintosh "was allowed by the only trustee who acted under the said bond, "to intromit with and uplift the said sum of 5000*l.* in the year "1830, on a consent obtained from Mrs. Macintosh during her "coverture; that the said sum was invested by Macintosh in the "purchase of a redeemable annuity from Thomas Fraser, Esq., "then of Lovat, now Lord Lovat, and the repayment of the "capital was secured on certain policies of insurance effected by "Macintosh on the life of Lovat, and his wife, the premiums of "which were annually provided for out of the annuities payable "by Lord Lovat in consideration of the said 5000*l.*: Finds that "the marriage between the said Mrs. Jane Gordon and Lachlan "Macintosh, was dissolved by the death of Macintosh in 1832; "and that Alexander Adam Gordon Macintosh was the only "surviving child of the marriage, but that he died in pupillarity "in 1839: Finds that the legal rights of Mrs. Jane Gordon in "the sum as secured to her by the said bond, at the date of the "marriage, cannot be affected by the transactions of the said "Lachlan Mackintosh, subsequent thereto, which were hazard- "ous and prejudicial to her, and unauthorised by the bond, and "that the husband's heir cannot found on any deed or deeds of "consent obtained by him from his wife *stante matrimonio*: "Finds that Mrs. Jane Gordon is now entitled to repudiate and "recall the same, and that she has, by a competent deed produced, "recalled her consent: Finds that, according to the terms and "conception of the said original bond, and under the admitted "state of the fact, that both the child of the marriage and the said "Lachlan Macintosh have predeceased his wife, the prospective "but contingent interest of these parties, under the substitution "in the bond, has now ceased; and that the sole interest in the "fund, secured by the said bond, and the right of uplifting, dis- "posing, and burdening the same at pleasure, is vested in the "claimant, Mrs. Jane Gordon; and in respect it is not denied "that the fund *in medio* consists of money to be realized under the

" foresaid policies, which must be held as a *surrogatum* for the " amount of the original bond, uplifted by Lachlan Macintosh as " aforesaid, finds, on the whole matter, that the same is now " claimable by the said Mrs. Jane Gordon, and prefers her ac- " cordingly to the fund *in medio:* Finds no expenses hitherto " incurred due to either party, and decerns.

" (Signed) J. CUNINGHAME.

" NOTE.—The claim of Mrs. Macintosh to the property and " control of her own fortune, under the whole circumstances " articulately detailed in the interlocutor, appears to the Lord " Ordinary to be so strongly founded in justice, that he should " have regretted if any rules of strict law had prevented him " from giving effect to it. But it is apprehended that the autho- " rities which fix the legal construction of the principal docu- " ments on which the question turns, decisively support the plea " of Mrs. Macintosh.

" In the outset, it is supposed to be quite clear that the rights " of this lady must be ascertained and governed by the terms of " this bond under which the original portion was bestowed on " her by her father. The fund stood on that bond at the date of " the marriage. The *jus mariti* of the husband was strictly " *excluded*, and therefore no transaction or arrangement which he " prevailed on his wife to give her consent to, *stante matrimonio*, " can affect her legal rights as previously constituted.

" The next and chief question in debate is, What was the " extent of the right vested in Mrs. Macintosh under the Duke's " bond of 1825? The *heir-at-law* of Lachlan Macintosh con- " tends that Jane Gordon was effectually and in apt and formal " terms excluded from the fee of the sum provided under this " bond—that this was held by her as a trustee for the child of " the marriage, whom failing, for Lachlan Macintosh;—while " Mrs. Macintosh maintains that the fee was vested in *her* for " her own behoof, subject to such limitation in her use or control " of the fund as the peculiar terms of the bond (subject to renewal

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" *in* the events specified) may import in law. The Lord Ordi-
" nary is of opinion that Mrs. Macintosh's plea is well founded
" on every consideration of weight in the law, whether founded
" on the presumed intention of the granter of the bond, or on the
" authorities and precedents which fix the legal meaning and
" import of an obligation and destination expressed in the terms
" used in the bond which is now the subject of construction.

" In the *first* place, it is hardly possible to suppose that any
" rational parent granting a provision to a daughter in the terms
" of this bond, could seriously *intend* that in case of the pre-
" decease of her husband a few years after the marriage, and of
" the death of the children of the marriage in *pupillarity*, the fee
" of the provision should be claimable by the collateral and dis-
" tant heirs of the first husband, thus depriving a woman still
" in youth, and likely to form another connexion in life, of the
" capital of the whole provision. If that extraordinary arrange-
" ment had been contemplated by the father, there were various
" ways of carrying his intentions into effect; but most assuredly
" the bond in that case never would have been expressed in the
" terms in which it was here framed. But

" In the *next* place, it is apprehended that the clauses in the
" bond, according to their legitimate and established construction
" in our practice, were sufficiently calculated to preserve every
" interest which the parties must be presumed to have had in
" view at its date; and as these interests no longer exist, Mrs.
" Macintosh is now left in the free and uncontrolled right of the
" provision secured to her by her father. The material clauses
" of this bond deserve to be separately considered.

" 1. In the leading and obligatory clause of the bond, the
" Duke became bound to '*make payment* to the said Jane
" ' Gordon at the first term of Whitsunday or Martinmas after
" ' the said intended marriage, of the sum of 5000*l.* sterling,
" ' and that to the said Jane Gordon in liferent, during all the
" ' days of her lifetime, excluding the *jus mariti* of the said

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" ' Lachlan Macintosh, her intended husband, and to the " ' children to be procreated of the said intended marriage in " ' fee, and that in such proportions as the said Jane Gordon " ' and Lachlan Macintosh shall appoint by any writing,' &c., " ' or failing issue of the said intended marriage, to the said " ' Lachlan Macintosh in fee.'

" Now, if that clause stood *per se*, it is supposed that no " lawyer could seriously entertain a doubt that the payee of " the bond, though *ex figura verborum* a liferentrix, was truly " and legally the fiar. There have, it is supposed, been thousands " of instances since the case of Newlands, in 1794, in which " similar destinations to parents in liferent, and to children " *nascituri* in fee, have occurred in practice, and no party has " for many years attempted to question their legal effect. They " have been invariably held to vest a fee in the nominal liferenter. " The case of Cuthbertson in 1781 (*Dict.*, p. 4279) quoted in " Mrs. Macintosh's case, is an early precedent in point; but the " case of Lindsay in 1807, (App. to *Morison*, *voce* fiar, No. 1) " appears to be a still stronger exemplification of the leaning of " the law to hold a fee as vested in the nominal liferentrix under " a destination to a party in liferent, and her children *nascituri* " in fee. There, William Lamberton having given money to " his married daughter in trust, to purchase a tenement, the " conveyance as arranged was taken 'to William Lamberton " ' (the father) during all the days of his life, and after his " ' decease to his daughter Janet Lamberton, also in liferent " ' *during all the days of her life*, and to the children already " ' procreated or to be procreated of the marriage between her " ' and David Lindsay, equally among them in fee.' There was " a power reserved to William the father, without consent " of the daughter, to alter or innovate the destination, or even " to *sell* or *burden* the premises. He never did so; but on his " death Janet the daughter sold the tenement, when a declara- " tor was brought to try her right; and the Court with only one " dissentient voice, found that the fee was in Janet.

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"In short, upon these and other authorities of daily citation, "it is thought that the import of such a destination as that "which is set forth in the obligatory clause of the present bond, is "now irreversibly fixed, and that no question as to its import "could now be safely mooted.

"2. But the whole difficulty of the present case is said to "arise from another provision in the bond, which now deserves "particular attention. The clause referred to is that whereby "the noble granter of the bond stipulated that he should be at "liberty to pay up the capital sum, and that so often as the sum "was paid up, and as the existing security was changed, 'it "'should be *again lent out and reinvested* on good and sufficient "'security, at the sight and to the satisfaction of the Most Noble "'George, Marquis of Huntly,' (and certain other gentlemen "named), 'the security to be taken *in the same terms* as are "'above expressed.'

"Here it will be observed that no provision was made for "any new restraint being introduced into the title. The secu- "rity was to be granted on every renewal precisely in the *same* "*terms* as the original bond. But the plea of the heir-at-law "of the husband is, that this stipulation had the effect of con- "verting Mrs. Macintosh's right into that of a mere *liferentrix*, "and that it reduced such fee as was technically vested in her "into a fiduciary fee for the children *nascituri* in the first "instance, and failing them, for Macintosh the husband and his "heirs-at-law.

"It seems, however, to be contrary to every sound and legi- "timate inference to hold that this was the real meaning of the "parties in the clause under consideration. The bond appears "to have been prepared by the agent before this Court of a "nobleman of extensive property, at a time when it had long "been understood by the profession, that a destination in similar "terms carried the fee to the nominal liferentrix, and it was "matter of equal notoriety at that period, that parties who

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" intended to limit a provision about to be given to a young " relative, to a liferent only, were bound either to direct the " conveyance to be given for ' liferent use *allenarly*," as laid down " in the case of Newlands, or otherwise to convey the subject " or fund directly to *trustees*, as in the case of Seton (*Dict.*, p. " 4219), who would have held the fund securely for behoof of " all to whom any ultimate right was intended to be given. But " when the bond was not so expressed, it follows on every prin- " ciple of law and right construction that it was framed for " another purpose, which, if discoverable, must receive effect " from this Court.

" In this inquiry, it is well known that prohibitions to *uplift* " money secured by bonds in special terms, and obligations to " reinvest the fund if paid up, have not been of very frequent " occurrence in modern practice; but in the earlier periods of " our law these were not uncommon. In the *Dictionary* there " is a whole section on the effect of ' prohibitions to alter,' and " ' to uplift *without consent*,' and of clauses ' of return,' &c. " (*Dict.* 4304), and the import of all the decisions seems to come " to this, that such clauses were intended to prevent *gratuitous* " alienations; but that they could not affect the previous and " legal right vested in the original creditor or payee, at least " so far as to prevent the property or fund so vested in him from " being attached for his onerous debts and deeds, or even alien- " ated by the creditor for just and useful purposes. In illus- " tration of this doctrine, reference may be made to the case of " Drummond (*Dict.*, p. 4307), which is reported at great length " both by Stair and Gilmour, and to the cases of Strachan in " 1683 (p. 4310), and Strachan in 1714 (p. 4312)—all reported " under the same title of the *Dictionary*.

" It is conceived that these authorities sufficiently indicate " the legal import and extent of the obligation to keep up and " renew the security in the present case. That stipulation could " not have been inserted for the purpose of *divesting* the disponee

"or creditor of the right vested in her by the obligatory clause "of the bond. On the contrary, it provides anxiously for the "repetition and renewal of the security in the precise terms of "the original right. The rights of parties in the fund, therefore, "must be judged of in the same manner as if the Duke of "Gordon had *retained* the fund upon the original bond, without "paying up the capital till the present period; in that event "the question would have occurred purely, and without any "specialty, if the fee or right of property in this fund now "remained with Mrs. Jane Gordon, the favoured party, or if it "had passed to the heirs of her deceased husband, who were "strangers in blood to her and her father. Could onerous cre-"ditors contracting with Jane Gordon not have attached this "fund as now free and disencumbered of every burden and inte-"rest previously existing in third parties? Or would Mrs. "Jane Macintosh be viewed as a mere fiduciary for her hus-"band's collateral heirs?

"The Lord Ordinary is of opinion that the widow's plea on "these points would have been insuperable. She was, by the "conception of the original bond, constituted in proper technical "terms the fiar of the fund; and though there was a substitution "fenced with a certain prohibitory clause, which effectually pre-"vented her from altering the destination, it is at least question-"able if her creditors would have been legally restrained, even if "the marriage had *subsisted*, from attaching the fund for any "properly *onerous* contraction of hers; and still less can she "be prevented from alienating the subject, when the parties "have *predeceased* her, whose contingent interest, now at an "end, was manifestly the sole cause of any limitation imposed "on her by her father, in the uplifting and disposal of her "portion.

"The case is treated by the heir-at-law as if the clauses of "the bond in the present instance were equivalent to a formal "and irrevocable *conveyance* of the fund *in trust*, to the parties

" authorized to superintend the reinvestments. But if the legal " construction of the bond before suggested be correct, there is " an important distinction between the cases. The bond im- " posed a certain restraint upon the wife, but it did not in law " entirely exclude her administration and power over the fund " for *onerous* causes, as a conveyance to stranger trustees would " have done. This apparently was not intended. It might " have been greatly against the interest of Mrs. Macintosh's " children themselves, whose ultimate advantage was obviously " contemplated in this bond, so to restrain the fiar; as it might " be necessary for her to raise or borrow money on the bond, to " educate or establish them in the world, or for other purposes " beneficial to herself and her family. Hence the appointment " of third parties to advise the fiar in uplifting and reinvesting " the capital was proper, as her husband's *jus mariti* was ex- " cluded, and it was probably thought expedient to put some " restraint on her against unnecessary and gratuitous alienations. " But such a provision cannot change the legal character of the " right conferred on the payee under the principal clause of the " bond, or raise the mere *spes* of substitutes under a contingent " destination into an immediate right of fee.

" Finally, even if the sum in the bond here, instead of being " made payable directly to Jane Gordon, had been at first con- " veyed by the Duke of Gordon, in proper and formal terms, to " *trustees*, for behoof of the same parties who are called under the " substitution in the bond, it is probable that the claim of Mrs. " Macintosh, in the events which have now emerged, would have " been equally well founded. Even if the Duke of Gordon had " placed 5000*l.* in the hands of trustees, for behoof of his daugh- " ter in liferent, during all the days of her life, and of the children " of the marriage, whom failing, of Lachlan Macintosh, her " husband, in fee, (without any mention of heirs,) it is clear that " such a provision would not have been exigible from the trus- " tees till Mrs. Macintosh's *death;* and if so, no *jus crediti* would

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"have vested in any of the substitutes till the *period of payment*, "as laid down by the First Division of the Court in the late "cause of Wright and Ogilvie, which was elaborately argued "and well considered. (See *Rep.*, 9th July, 1840.) But if, as "has happened here, all the substitutes die without issue, *prior* "*to the term of payment*, it follows that the provision, in so far "as any contingent interest was given to substitutes, would "lapse, and so leave the fund (if there had been a trust) to be "claimable in absolute property by the party for whose primary "behoof it was created.

"Indeed, even when a trust has been constituted over a wife's "property in an antenuptial *contract of marriage*, or (semble) in "any other deed in contemplation of marriage, it may be recalled "or put an end to by the radical owner of the subject, on the "dissolution of the marriage, when the interests have come to an "end in respect of which the trust was created. This was almost "the unanimous opinion of the Court in the case of Mrs. Torry "Anderson of Tushielaw in 1837 (see *Reports*, 2d June, 1837), "in which it was held, that while a trust made by a bride of her "property, in an antenuptial contract of marriage, could not be "recalled pending the marriage, it might unquestionably be "revoked after the dissolution of the marriage, when no party "had any longer an interest to maintain the trust. That prin- "ciple might have applied to the circumstances of the present "case as they now stand, even if a formal trust had been created; "but the parties did not think it necessary to constitute any "such stringent security when the marriage of the claimant "took place.

"In every view, therefore, which the Lord Ordinary can "take of this case, he is of opinion that there are ample "grounds in point of law for sustaining the claim of Mrs. "Macintosh."

The appellant reclaimed against the above interlocutor, but the Court (on 8th December, 1841,) adhered.

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The appeal was against these interlocutors.

*Mr. Turner* and *Mr. Anderson* for the Appellant.—The bond having been given *nomine dotis*, the presumption is that it was intended by the granter to go to the husband or his representatives, and it will take that course unless there be words in the deed expressly to the contrary, Gairns *v.* Sandilands, *Mor.* 4230, Watson *v.* Johnstone, 5 *Bro. Supp.* 927; this presumption is strengthened in the present case, by the circumstance that the appellant was an illegitimate child, who, according to the law at the date of the bond, could not test upon her personal estate: the natural presumption therefore, is, that she was intended to take a liferent interest only, the fee going to the children of the marriage, or the husband on their failure.

Upon the terms of the deed, apart from presumption, a mere life interest is given to the mother. Though in feudal rights a conveyance to A in liferent and her children *nascituri* in fee, gives a fee to A against the natural meaning of the words, that arises from the feudal principle that the fee must be somewhere, that it cannot be *in pendente*, and as the children are not in existence, it must, therefore, be in the parent. Yet, even in these cases, if the plain obvious intention of the deed is to give A only a liferent, though by force of the maxim she will take the fee, it will be only a fiduciary one, the trust being for the children. In grants of money, the same feudal technicality was introduced. But that gave way afterwards to the presumed intention of the granter, which is now the only question; and if the terms import unequivocally a gift to the parents in liferent and the children in fee, the parents take no more than a substantial liferent, unless indeed they have power to uplift, and no obligation is imposed upon them to reinvest, as in the present instance. Gerran *v.* Alexander, *Mor.* 4402; Mein *v.* Taylor, 5 *Sh.* 779; Turnbull *v.* Tawse, 1 *W.* & *Sh.* 80; Leitch *v.* Leitch's Trustees, 3 *W.* & *Sh.* 366. In Newlands *v.* New-

lands' Creditors, *Mor.* 4289; Hunter *v.* Hunter's Trustees, 9 July, 1794, *Sig. Coll.* 73; Ewan *v.* Watt, 6 *S.* & *D.* 1125; Fisher *v.* Dixon, 10 *S.* & *D.* 55; the principle of decision was the intention of the granter, as discoverable from the words used in the instrument. The power of appointment given by the deed was inconsistent with any idea of the absolute fee being given, as was held by the judges in giving judgment in Millar *v.* Millar, 12 *Sh.* & *D.* 31. If the right had been to the respondent in liferent and her husband in fee, he would undoubtedly have taken the fee. The intervention of the unmarried institutes, the children of the marriage, cannot have any effect upon this right of the husband; the husband is a conditional institute. Gordon *v.* M'Culloch, Bell's *Octavo Cases*, 188; Brown *v.* Coventry, Bell's *Signet Cases*, 310; Whittet *v.* Johnston, 6 *W.* & *Sh.* 406.

[*Lord Campbell.*—The case seems to be not so much on the rules of construction as on the plain intention of the Duke. The intention seems to have been supposed to be that the lady should have the control of the money.]

Yes. But he did not intend that she should have it, except according to the rule of law. The moment a child came into existence, it took a vested interest in the provision, and this was not divested.

*Lord Advocate and Mr. Bacon* for Respondent.—Upon the terms of the bond the wife was fiar, under certain restraints on her power of dealing with the fund, which it might have been necessary to consider if children had been alive, but the discussion of which by their failure is altogether unnecessary. The intention of the granter is the rule of construction, and that intention must be presumed to have been to favour the respondent. She was the granter's daughter, and the party on whose account the provision was made, and the obligation to pay is directly to her, without qualification; the subsequent addition of

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the words, "and that during all the days of her lifetime," cannot alter the right constituted by the leading obligation. Even where the right has been to the parent expressly in liferent, and children *nascituri* in fee, the parent has been entitled to a fee. Tovy's Creditors, *Mor.* 4262; Dewar, 1 *W.* & *Sh.* 161. So also where the words have occurred which exist in the present case, —Douglas, *Mor.* 4269; Lindsay, *Mor. voce* Fiar, App. No. 1; Cuthbertson, *Mor.* 4279; all that is in the children *nascituri*, is a mere *spes successionis*. If a liferent only had been intended, the right could be restricted to that only by the use of the word "allenarly," or something equivalent. Newlands' Creditors, Hunter *v.* Hunter's Trustees, and Ewan *v.* Watt, *ut supra*. The other authorities relied on by the respondent were Bell's *Principles*, 535, and cases there cited, Frog, *Mor.* 4262; Lilly, *Mor.* 4267; Muir, 4288.

LORD CAMPBELL.—This case turns entirely on the construction of a bond dated 27th July, 1825, which was executed by Alexander, Duke of Gordon, on the marriage of his natural daughter; and the question is, whether, in the events which have happened of there being one child of the marriage, and the husband and the child predeceasing the wife, she is entitled to the absolute interest in the sum of 5000*l.* mentioned in the bond, or, subject to her liferent, the money ought to go to the representatives of the husband, either in his own right or as representing the child.

If this had been an English instrument coming before an English court, the case would have admitted of no doubt. Most unquestionably the wife would have taken only a life interest in the 5000*l.*, and it would have vested in the child or children of the marriage as they came into *esse*, subject to the power of appointment given to the husband and wife; and if there had been no child then it would have gone to the husband.

I must say, my Lords, that if this had been a mere question

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of the intention of the settler, to be got at from the language he employs, taken in its natural and usual sense, I should come to the same conclusion. He appears to me clearly to have meant to make a provision for the children of the marriage, and for the husband, if there should be no children, independently of the acts of the wife. He gives the money to her "during all the days of "her lifetime, and to the children to be procreated of the mar- "riage in fee, in such proportions as the husband and wife should "appoint, and failing issue of the marriage, to the husband in "fee." Now, the only footing on which it is contended that she is now entitled to the absolute interest in the money is, that she took the fee in it under the bond, with power at any time, for onerous cause, living children of the marriage, and living the husband, to have alienated the whole of it. But the words employed naturally import that she should merely take a life interest, and this meaning is strengthened by the directions as to the manner in which the money is to be secured and the interest is to be paid.

But we are bound to construe this Scotch bond according to the rules of the law of Scotland, and there turns out to be a rule in that law often recognised, that if there be a sum of money given to a parent in liferent, remainder to children *nascituri* in fee, the parent takes a fee in the money, with a power of alienation for onerous cause, unless the word *allenarly*, or some word of equal force, be added to the clause, describing the life interest of the parent. I have examined the case of Newlands and the other cases cited at the Bar, (which it is unnecessary to enumerate,) and I think they fully establish this rule. I am not at liberty to inquire into the reasonableness of it, or how far strict feudal principles, by which the disposition of real property has been regulated, ought to have been applied to the settlement of a sum of money as a provision for a family on marriage. The decisions of the Scotch Courts make no distinction between land and money in this respect, and with regard to money, treat such

a disposition to the parent for life, remainder to the children *nascituri*, without the word *allenarly*, as in effect a simple destination, which may be defeated by the parent who is considered the fiar. If the word "*allenarly*" is added, this is tantamount to fencing clauses in a deed of entail, and prevents alienation, though still the parent would be the fiar.

I cannot say that the word "allenarly" more clearly expresses the intention of the settler, who, when he gives a life interest to the parent and the fee to the children, can hardly intend that the parent should take the fee. But I consider that we are bound by the long and uniform current of authorities, and that these interlocutors, which have been unanimously pronounced by the Judges below, ought to be affirmed with costs.

LORD BROUGHAM.—My Lords, I concur with my noble and learned friend who has just addressed the House. Originally I did entertain considerable doubt upon this case; because I could not help feeling that if this question had arisen here, there would have been no doubt about it; but when I come to look into the authorities and the text writers down to the very latest period, (and no one text writer has stated more clearly the principle than Mr. Bell in his very excellent work, his *Abstract of the Principles of Scotch Law*, Sections 1713 and 1923,) looking to those authorities and to the decided cases, the law of Scotland appears to be very clear, particularly in that very strong case of Newlands, which seems to have gone to the very verge of the law in this respect, so far as regarded the opinions of the Judges, and of Lord Chancellor Loughborough in this House; for that case would have almost carried it to a fee in the parent, notwithstanding the word "*allenarly*;" it was within an ace of going to the parent, although the word "*allenarly*" existed in the instrument. How then can it be contended, that without "*allenarly*" it would not have gone to him?

The principle seems to have been taken from the Feudal Law

treating money as a feudal matter, which was the tendency of all the old law in every country of Europe at one particular time. You find it in the French law, you find it in the German law, you find it less perhaps in the Dutch law, they being a more mercantile community probably; and you find it in the law of all the Italian States. I have had occasion to look for other purposes, into the foreign systems of jurisprudence, and I find that, for a long period of time, about two centuries or more, there was a general tendency to feudalise everything,—they feudalised all the great offices of the country, they feudalised employments: in private manors they feudalised grants of every kind, rights of fishing and so forth, and rights of chase; and in the same way they feudalised money and they feudalised personal chattels; and accordingly the Scotch law, not less feudal than the rest, but perhaps even more feudal than any other system, had a tendency to introduce feudal principles into the disposition and dealing with personal chattels: whence is the origin of this? It is the holding in abhorrence the doctrine of the possibility of the fee being *in nubibus*, of which we have very frequent traces in our old feudal law with respect to chattels and real property. It held, that money could not be otherwise granted than according to the general feudal rules; and therefore, in the case of a grant simply of money, or a chattel interest to A in liferent and to B in fee, (without taxing words, without the word "*allenarly*,") or to A and B in conjunct liferent, (a very common case,) "and to their children "*nascituri* in fee," or a gift in any other way to unborn issue in remainder, as we should call it, after the takers for life, the rule was, that the fee was first granted to the parties *in esse*, unless there were words to tie up the interest given to the parties *in esse* to a mere life interest.

Now that word "*allenarly*" is a more solemn and usual word, and that word is sufficient to restrict the interest to a life interest, unless other words are to be found in the instrument which will

impeach and diminish the effect of that word. There may not be a life interest merely if the word "*allenarly*" be defeated in its operation by those other words. But if that word exists and be undefeated by other words in the instrument showing the intention, then it will restrict the interest of the parent, the first taker, to a life interest, and preserve the fee to the children *nascituri*.

Now the case of John Newlands shows how strong the principle is. That case was argued before the whole Court sitting in the most solemn form, and there seems to have been a very great disposition on the part of several of the Judges, constituting, however, the minority of the whole, even in that case with the word "*allenarly*" in the will of the testator, to give a beneficial interest to the parent, and to defeat the interest in remainder expectant upon the termination of his life interest in the issue; and the Lord Chancellor, Lord Loughborough, leaned towards that opinion, so strongly imbued was he with the principle. Nevertheless, the decision was that the word "*allenarly*" was sufficient there, and was not defeated in its operation and effect by other words; that it was sufficient to convey to the children the beneficial interest, and to the parent a life interest only. However, it is to be remarked, that in these cases there is still a fee given to the parent, from the abhorrence of the possibility of the fee being *in nubibus*, but it is only a legal fee; he being a trustee for the unborn issue, he takes what is termed in that decision a fiduciary fee.

Now, my Lords, in this case there is no such expression; there is nothing to limit the grant, there is no such word as "*allenarly*;" there is nothing to get rid of the grant, and, consequently, there is nothing to prevent the legal principle having its operation. For these reasons, however much I may lament it, (for it is quite clear what the intention was), I entirely agree in opinion with my noble and learned friend.

I cannot help here adverting to what I must say, in my view,

is of the greatest authority and weight, the venerable authority of Lord Corehouse, in one of these cases, Mein v. Taylor, in the year 1827, in which he says, in a note to his interlocutor to which the Court adhered, "Where a conveyance is made to one "in liferent and his children unnamed and unborn in fee, it is "settled law that the fee is in the parent, and that the children "have only a hope of succession to prevent the infringement of "the feudal maxim that a fee cannot be *in pendente*. It is per- "haps to be regretted," his Lordship says, (and I am sure I entirely join in that regret, and from what my noble and learned friend let fall probably he joined in that regret also), "that the "point was so settled, because the plain intention of the maker is "a consequence often sacrificed to a mere form of expression, and "the feudal maxim might have been saved by supposing a fidu- "ciary fee in the parent, as is done when the liferent is restricted "by the word '*allenarly*' or '*only*.'" Now that would have got rid of the whole difficulty, and there would have been no fee *in nubibus* any more than there is when the word "*allenarly*" is added, for then it is allowed that there is a fee, that the legal estate, a fiduciary fee, is in the parent, and it might just as well have been so settled. "Upon this point, however," says his Lordship, "it is too late to go back, but certainly the principle "ought not to be extended to cases which have not yet been "brought under it." That is quite certain. Now if this had been a case which had not been brought under it one might have had some ground for doubt, but it is a case which has been brought under it, and it falls within that principle, in my humble opinion, so clearly, (and we cannot get rid of that principle of law), that, however much we may regret that it has been adopted, it is too late, as Lord Corehouse says, to go back; it falls within the principle; it is too late to reconsider it, and we are bound by it. I therefore agree, with my noble and learned friend, that we have no course to take but to affirm the judgment of the Court below.

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LORD COTTENHAM.—My Lords, it is a matter of some surprise, that where the Courts in Scotland have professed to act upon the intention of the authors of such instruments, they should have prescribed one word—one word only—by which the party is at liberty to express that intention; and that even where the Court have no doubt of the intention, yet if that particular word be omitted, the Court have not the means of carrying into effect the intention. That is the professed object in general of the Court, and had not the decisions been to the contrary, I should have said that that would have been their duty.

Now, in this case, there can be no doubt of the intention of the maker of the instrument. It is clear that he meant that the daughter should enjoy the interest of the property for her life, and that her children should enjoy it after her death. But although he has expressed that intention, so that nobody can misunderstand it, he has not used the technical term, which alone the Court of Scotland deals with, rather than inquiring into the intention of the party.

It cannot, however, after the decisions which have taken place, be a matter in dispute, that the frame of this instrument falls exactly within the terms of the decided cases, and that the daughter took the fee not only in a fiduciary character, but beneficially; that it was subject to her own control, and that she had the power therefore of defeating the interest of her children. But the argument was pressed principally upon the clause which provided, in the event of the money being paid, for its reinvestment, and thence it was inferred that this either amounted to an expression of intention as clear as if the particular word "*allenarly*" had been used, or, which is the same thing, that it actually created a trust which would have been sufficient if such had been the intention of the original framer of the grant.

Now it would be strange indeed, if, in the very same instrument, the Courts were to reject an intention so palpably plain

as it is from the terms in which the gift is made, and say, that that did not impart an interest for life only and a gift over to the children, but come to a conclusion in favour of the entail of the property from a subsequent clause in the same instrument, made for a totally different purpose. In fact, the terms of that provision, which relates to the reinvestment of the money by lending out the fund in the event of the bond being paid, clearly had no reference to the extent of the interest which the parties were to take, but merely provided that, in the event of the money being paid, and paid to the mother, for she was at liberty to receive it, it should be lent out again to be taken in the same terms. Now supposing it had been paid and lent out in the same terms, which would have been following strictly the directions of the author of this gift, we should then have found the money lent out in precisely the same terms in which the rights of the parties are declared in the earlier part of this instrument; it would not have extended the rights of the parties beyond that which was found previously to exist.

It appears to me, therefore, very clear that the subsequent provision as to the lending the money out in the event of its being paid, cannot operate upon the construction to be put upon the terms of the gift, and the terms of the gift are such as upon the decided authorities give the fee to the parent.

Ordered and adjudged, That the petition and appeal be dismissed this House, and the interlocutors therein complained of be affirmed with costs.

DEANS, DUNLOP, and HOPE—ALEXANDER DOBIE, Agents.

[Heard 13*th March*. Judgment 17*th April*, 1845.]

The Rev. Dr. Robert Gordon, Collector of the Fund for a Provision for the Widows and Children of Ministers of the Church, and of the Heads, Principals, and Masters in the Universities of Scotland, *Appellant*.

The Right Honble. Thomas Robert Earl of Kinnoul, *Respondent*.

*Kirk.— Vacant Stipend.— Widows' Fund.*—The stipend which accrued during the vacancy of a benefice, by reason of the Church Courts, in obedience to a law passed by the Church, refusing to put the presentee of the Patron upon his trials, *found* to belong to the Widows' Fund, under the provisions of the 54 Geo. III., Cap. 169, and not to the Patron.

On the 31st of August, 1834, the parish church of Auchterarder became vacant by the death of the then incumbent.

At a meeting of the Presbytery of Auchterarder, held on the 14th of October, 1834, Robert Young, a Licentiate of the Church of Scotland, tendered a presentation by the respondent, the patron of the parish, and required them to take him upon his trials. The Presbytery appointed the presentation to lie on the table till their next meeting.

At the next meeting, which was held on the 27th of October, 1834, all the documents necessary to support the presentation having been produced, the Presbytery so far sustained the presentation as to appoint the 2nd of December for moderating in a call. On the 2nd of December a majority of the male heads of families, on a roll inspected by the Presbytery, having dissented to the call and settlement of Young, on an opportunity afforded them by the Presbytery, in conformity with the Act of the General Assembly, called the "Veto Act," but contrary to a protest on the part of Young, the Presbytery adjourned conside-

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ration of the proceedings until their meeting on the 16th December following.

On the 16th December the Presbytery found that a majority of the persons on the roll still dissented. And an appeal to the Synod having been taken against their proceedings they sisted procedure until the issue of the appeal.

On the 21st April, 1835, the Synod dismissed the appeal, and remitted to the Presbytery to proceed. An appeal was then taken to the General Assembly, which was also dismissed on the 30th of May, 1835.

On the 7th July, 1835, the Presbytery rejected Young as presentee, and directed notice of the rejection to be given to him and the respondent, the patron.

On the 5th October, 1835, the respondent and Young brought an action against the Presbytery and the appellant, to have it found that the Presbytery ought to have taken Young upon trial, and to have inducted him if found duly qualified; that if they should still refuse to proceed towards his induction, it should be found that Young had right to the stipend and other temporalities of the parish for crop aud year 1835 and in time coming, and that the Presbytery and the appellant should be decerned not to molest him in the enjoyment of these temporalities; or, alternatively, that the respondent, the patron, had right to receive the temporalities, and to possess and use them without interruption or molestation from the Presbytery or the appellant. These conclusions were followed by a consequential one against the heritors for payment of the stipend localled upon them.

The Court of Session, on the 10th of March, 1838, found that the Presbytery had acted illegally and in violation of their duty, in refusing to take Young upon trial. That decree was carried by appeal to the House of Lords, and was affirmed on the 11th of July, 1842.—Vide vol. i. p. 662. On the return of the cause to the Court of Session to have the judgment applied, the Lord Ordinary found that the Presbytery were bound to take

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Young upon trial, and to receive and admit him as minister if found duly qualified. The Presbytery, however, acting on the instructions of the superior Church Courts, refused still to take Young upon trial; but at the same time, did not attempt to fill the benefice with an incumbent of their own nomination, so that it continued vacant.

The respondent, the patron, then insisted upon the remaining conclusions of the action; and on the 21st of November, 1839, the Lord Ordinary gave decree in his favour for the whole emoluments of the parish, other than the stipend, as to which he ordered printed cases by the parties to be reported to the Court. Neither Young nor the Presbytery took any part in this discussion, which was maintained solely between the appellant and the respondent.

The pleas in law which were stated by the appellant in regard to the conclusion involved in this discussion, were:

"1. The presentee of a parish has no right to the civil fruits "of the benefice, until he has been collated by the proper Eccle- "siastical Court.

"2. Where delay occurs in collating to a benefice, vacant "stipend arises, which, by the 54th Geo. III., c. 169, it is pro- "vided, shall be paid to the Ministers' Widows' Fund as coming "in place of the patron to whom such stipend formerly was "payable, under the obligation to apply it to pious purposes. It "makes no difference, in point of law, as regards the right of the "Widows' Fund to vacant stipend, from what cause the delay "in the settlement of the presentee arises."

The plea for the respondent was in these terms:

"The statute 54th Geo. III. c. 169, does not give the defen- "der, as Collector of the Widows' Fund, any right to the stipend "concluded for in this action; that statute, neither in its enact- "ment, nor in its spirit, having any application to the case of a "direct interference by the Church Court with the vested rights "of a patron and presentee, as condescended on in this case."

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Upon advising the cases for the parties, the Court ordered additional cases, "upon the point, whether the Trustees for the "Ministers' Widows' fund can legally claim the stipend of "vacant charges, in case it appear that these remain vacant by "the illegal proceedings of the Church."

The cases upon this question were laid before the Judges of the other Division, and the Lord Ordinary, for their opinions, which were delivered at length: vide 5 *B. M.* & *D.* 15. Thereafter, on the 19th of July, 1842, the Court pronounced an interlocutor, repelling the defences for the appellant, and decerning in favour of the respondent. The appeal was against this interlocutor.

*The Lord Advocate* and *Mr. Kelly* for the appellant.—By the 54 Geo. III., cap. 169, whenever a parish becomes vacant by death, translation, resignation, or deprivation of the incumbent, and thereby vacant stipend arises, the stipend, in so far as it had, previously to the statute, been applicable by the patron to pious uses, is to be thenceforth paid to those holding the office of the appellant. If, then, the vacancy in the present case arose from the death of the incumbent, and the stipend would, previously to the statute, have been applicable to pious purposes, the right of the appellant must be unquestionable.

It is not denied that the vacancy, in its inception, arose from the death of the incumbent. But it is said, the tendering of the presentation and the acceptance of it by the Presbytery, in some way put a period to the vacancy occasioned by the death, and originated a new one. The benefice was not the less vacant that the presentation had been accepted. The presentee is not even ordained until he is inducted; and after he is inducted, his title does not draw back by relation to his presentation. It is difficult, therefore, to see how the vacancy was at any time other than one occasioned by the death of the incumbent; or how it could be so without destroying the title of the respondent.

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A distinction is attempted to be drawn between "vacant "benefice" and "vacant stipend;" the one as existing until the presentee is inducted, and the other ceasing so soon as a nominee is presented; and upon such distinction the respondent maintains, that in the present case, though the benefice remained vacant by the refusal of the Presbytery to take Young upon trial, the stipend ceased to be vacant immediately upon the presentation and refusal; but there is no authority for this distinction, which, on the contrary, is negatived by all the institutional writers, who speak of the stipend as being vacant on the refusal of the Presbytery to admit the patron's presentee. *Stair* II. 8, 35, and IV. 24, 7. *Ersk.* I. 5, 13, and 16. *Bank.* II. 8, 103. *Connel on Parishes*, 535. And in this they are supported by the decided cases, Cochrane *v.* Stoddart, *Mor.* 9951. Dick *v.* Carmichael, *Mor.* 9954. Indeed, if the presentation prevent vacancy as to the stipend, as the presentation must in every case be within the six months vacant stipend under the 54th Geo. III. could never arise, except where the patron refuses to present at all. And if the presentation did fill the benefice, how then could the patron claim the stipend when he is only entitled to it, because of the benefice being vacant?

The Act 1592, c. 117, gives the patron right to retain the fruits of the benefice, in case the Presbytery should refuse to admit a qualified presentee. But, by the common law, the fruits so retained could not be applied to his own purposes, and various statutes regulated the mode of their application.

The first was the Act 1644, c. 47, which directs that the stipends or benefices of kirks vaiking "by decease," &c. "or by "any other ways," should during the vacancy be employed by the patron in pious uses. This Act was repealed at the restoration, but so far as the patron was concerned, its provisions were re-enacted by the Act 1661, c. 52, whereby the stipends or benefices of kirks, "vacant by decease, deposition, suspension, "transportation, or any other ways," were given to the deposed

or suspended ministers for the space of seven years. And the Act 1685 gives the stipends and benefices of kirks, that shall vaik for seven years, to the use of the Universities.

The Act 1685, c. 18, directs the vacant stipends of all churches to be employed by the patron on pious uses, and the Act 1690, while it destroyed patronage, reserved the patron's right to employ the vacant stipends on pious uses within the parish.

Whatever, therefore, might have been the patron's rights under the general terms of the Act 1592, or at common law, it is certain that under these subsequent statutes, he was obliged to apply the vacant stipend to pious uses, and uses which were made such by statute, but even prior to the Act 1592, he could not have retained it for his own use, such an act, *Forbes* says, p. 49, would have been "a kind of sacrilege."

The stipend then, of a vacant benefice previous to the Act 54 Geo. III., belonged to the patron under an obligation upon him to apply it in pious uses, no matter from what cause the vacancy arose, and by the plain and obvious terms of that statute, all that he had was thenceforth given to the Widows' fund.

It is said, however, that the vacancy was occasioned by the illegal act of the Presbytery, and that the vacant stipend should not go to increase a fund which the churchmen had an interest to increase. To make this objection available, the two bodies must be the same, which they are not. The one is the Inferior Church Court, consisting of the Clergy and Lay Elders, acting in obedience to the Superior Courts, and the other a mixed body composed of the Clergy and Lay Professors of Universities. The body, therefore, by which the delay was occasioned is very different from that which the appellant represents, and one for whose acts the latter can in no way be responsible.

Whatever may be the character of the conduct followed by the Presbytery, that can never take away the title of the appellant

or give to the respondent a title which he has not otherwise under the statutes.

*Mr. Turner* and *Mr. Anderson* for the respondent.—To bring this case within the 54 Geo. III., three things must concur; a vacancy by the death, translation, or deprivation of the incumbent, vacant stipend thereby, and the vacant stipend which has so arisen, must be such as has been before applied by the patron to pious uses. The only question is upon the two last of these, for undoubtedly the vacancy arose by the death of the incumbent.

Prior to the introduction of Presbytery, in 1592, the Church had as little to do in collation as it now has in presentation, the presentation filled the benefice, and it required the statute of that year to give the Church controul over the exercise of the right of presentation by the proceedings in collation. After presentation sustained by the Presbytery, the act of the patron is complete, and so far as regards him, the benefice is full; that was expressly found in Gordon *v.* Gillon, 1 *W.* and *Sh.* 295, where it was held that a summons was duly executed against a presentee, whose presentation had been sustained, although he had not been inducted. The patron cannot present another, and the Presbytery cannot exercise their *jus devolutum.*

In the Auchtermuchty case, Moncrieff *v.* Maxtone, *Mor.* 9909, the Presbytery had not only refused the patron's presentee, but had inducted another, and yet the finding was that the patron was entitled to the stipend "as in the case of a vacancy," and a similar judgment was given in Cochrane *v.* Stodart, *Mor.* 9951.

In Dick *v.* Carmichael, *Mor.* 9954, the fruits of the benefice were given to the patron, on the authority of the Act 1592, on which the case was rested.

The Act 54 Geo. III. proceeded on a voluntary cession of their rights by the Crown and the patrons; it must therefore be

construed as a sort of contract, and the right claimed by the appellant, if it exist, must be found within the very words. At the date of its passing the Church Veto Act had no existence, no right could arise from any contemplation of its exercise. The only vacancy contemplated was by death, translation or resignation; but here, although the vacancy originated by the death of the incumbent, after presentation, when the veto came into operation, vacant stipend ceased to arise from the death, and was occasioned by force of the veto. So far as regarded the patron, the church was full by his presentation sustained by the Presbytery. After that the vacancy as to the stipend continued by the act of the Presbytery refusing to proceed in the induction. This was a state of circumstances which could not have been contemplated by the Legislature at passing the 54th Geo. III., and that Act cannot, therefore, be so construed as to embrace it. All that the Legislature had in view, was the stipend arising during the ordinary process for supplying the vacancy.

No doubt cases of rejection by Presbyteries of the patron's presentee had occurred prior to the statute of Geo. III., but in none of these did the rejection arise from a refusal by the Presbytery to obey the law, and in this view it is material to observe, that while the earlier statutes provide for vacancy by means enumerated, they use the comprehensive terms "and any other ways," but these words are omitted in the statute of Geo. III., as if it had been the object of the Legislature to confine the operation of that Act to the cases specially enumerated.

But even if the vacancy in the present case be held to have arisen by death, the question remains, whether the stipend is such as heretofore has been applicable to pious uses. Originally at common law, the patron had a right to the absolute property of the vacant stipend, and it was only by force of the statute that that right was changed to one merely of administration for pious uses; but these statutes applied only to vacancy arising by ordinary means.

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If it arose by the illegal act of the Presbytery, or of the Bishop while episcopacy was the form of worship, that was an entirely different case, the fruits of the benefice then belonged to the patron absolutely, that distinction was taken by the Acts 1592, c. 117; and by 1612, c. 1, both of which regard the benefice as full *quoad hoc*, after the presentation of a qualified person. And none of the Acts, 1661, c. 52; 1672, c. 20; or 1685, c. 18, interfere with this distinction, or the right of the patron arising from it. That the Act 1690, c. 23, did not embrace the case of refusal of the patron's presentee, is evident from this, that it abolished patronage or the right to present. The Statute 10 Anne, c. 12, which restored patronage, while it provided for the ordinary case of vacant stipend, left untouched, that of the patron having duly presented, and the Presbytery rejecting the presentation.

In this state of the law the Act of Geo. III. did no more than give to the Widows' fund, the stipend which the patron was bound to apply to pious uses, and left untouched that which by the Act 1592, he was entitled to in absolute property. There is nothing in *Stair* II. 8, 35, which, if the whole passage be taken together, is opposed to this account of the law. *Ersk.* I. 5, 16, is speaking of the settlement of another in opposition to the patron's presentee from an erroneous view by the Presbytery of the rights of parties competing, not of a refusal by the Presbytery to perform their duty.

By the judgment of this House in the previous branch of this cause, it was found that the refusal to induct the respondent's presentee was an illegal act. The appellant receives his appointment from the Church, and is responsible, and makes his annual report to it. The Church cannot, therefore, be allowed to benefit by its own tortious act, which in other words would be to encourage a repetition of its illegal conduct.

LORD COTTENHAM.—The question between the parties depends

upon the construction to be put upon some few statutes, which construction is to be ascertained by the terms of the statutes themselves, or by decisions which have been made with respect to the meaning of such terms. In my opinion there is no difficulty in the case from the decisions having put a wrong or doubtful construction upon the terms used. Had I to decide upon the statutes themselves, I should have put precisely the same construction upon them which I find has been adopted. There is, therefore, no room for hesitation as to the course which this House ought to follow.

If we trace the enactments from the earliest to the latest, it appears to me that the conclusion is most clear. The 54 Geo. III., c. 169, enacts, "That when any parish church becomes "vacant by the death, translation, resignation, or deprivation of an "incumbent holding the pastoral cure and benefice of such parish, "and that vacant stipend thereby arises; such vacant stipend "in so far as it has heretofore been applicable by the patrons to "pious purposes, shall thenceforth be levied and paid to the "general collector."

If, therefore, the stipend in question be a vacant stipend, which but for this Act the patron must have applied to pious purposes, he cannot have any claim as against the Widows' fund. The Act 10 Anne, c. 12, does not affect the question. The Act 1690, c. 23, though it deprived patrons of their right of presentation, reserved to them the right to vacant stipends; the words are, "But prejudice to the patrons of their right to apply the vacant "stipends on pious uses within their respective parishes, except "where the patron is popish, in which case he is to employ the "the same on pious uses by the advice and appointment of the "Presbytery, and in case the patron shall fail in applying the "vacant stipends for the uses aforesaid, that he shall lose his "right of administration of the vacant stipend, for that and the "next vacancy, and the same shall be disposed on by the Pres-"bytery to the uses aforesaid." Throughout treating the right

to vacant stipends, and the duty of applying them to pious uses as co-extensive.

The Act of 1685, c. 118. intituled, "An Act concerning "vacant stipends," declares that the vacant stipends of all "churches in time coming shall be employed on pious uses, and "provides that the minister's manse shall be maintained during "the vacancy out of the first and readiest of the vacant stipends." This Act limits the question to this. Is the stipend which arises during the time a parish is vacant, owing to an improper refusal of the Presbytery to institute a presentee, a vacant stipend within the meaning of the Act; for if so, the enactment is positive that it is applicable to and shall be applied to pious uses. The Act 54 Geo. 3, is positive that it shall be paid to the Widows' fund. There is nothing in this Act to limit the period of the vacancy during which the vacant stipend is to be applied. The minister's manse is to be maintained out of it, during the time of the vacancy, and not during a part of it only, and to be left to decay during the rest. But if there was no limit as to the duration of the vacancy referred to in this Act, there clearly was none in the Act of 1672, c. 20, entitled, "An "Act for employing vacant stipends for the Universities," which provides, "that the stipends and benefits of kirks that shall vaik "for the space of seven years, shall be employed for the use of "the universities and colleges."

The Act of 1661, c. 52, which appropriated all stipends or benefices of kirks which were vacant, or which should vaik to the support of deposed ministers for seven years, recited, "that "by divers acts it is found that stipends and benefices of vacant "kirks, or which thereafter should vaik by decease, deposition, "suspension, transportation of ministers, disunion of kirks, or "in any other way, should, during the vacancy thereof, be "employed in pious uses." And it directed a certain application of the stipend during a vacancy from whatever cause it might have arisen, and during whatever time it might continue.

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I have before observed, if the stipend which arises during the time a parish is vacant, owing to an improper refusal by the Presbytery to admit a presentee, be within the meaning of the Act, "a vacant stipend," that it was clear that the patron was bound to apply it in pious uses, and that the Widows' fund is now entitled to it. But the Act 1592, c. 117, supplies this supposition in terms, for it enacts, "that in case the Presbytery "refuses to admit any qualified minister presented to them by "the patron, it shall be lawful for the patron to retain the haile "fruits of the benefice in his ain hands." The vacant stipend in question, is the very vacant stipend dealt with by this Act of 1592, and is included at least in the term "vacant stipends," as used in all the subsequent Acts, all of which exclude the right of the patron to retain it for his own use, and the last of which gives it to the Widows' fund. Whether the patron retaining the vacant stipend was, at common law or under the Act of 1592, bound to apply the vacant stipend to pious purposes, I do not inquire; it is sufficient that the Act proves that the stipend arising as in this case during the time a parish was vacant, owing to an improper refusal of the Presbytery to do what it was incumbent upon them to do towards the admission of a presentee, was a vacant stipend within the meaning of those Acts which, but for the last of them, 54 George III., would have been applicable by the patron to pious purposes. Whether the vacancy exist owing to the refusal of the Presbytery to admit a qualified person, or to take him upon trial to ascertain whether he be qualified or not, cannot be material. In both cases the patron has performed his duty, and the Presbytery have failed in theirs.

Have the authorities in the law of Scotland doubted this to be the unambiguous construction of the statutes? Quite the contrary. Forbes, in his Treatise on Tithes, 49, says, if the Church refused to admit a qualified member presented by the patron, he might retain the fruits of the benefice in his hands,

but adds, that he could only apply them to pious uses. So Lord Stair, II. 8, 35, says, "During the vacancy, without the patron's "default but by the Presbytery refusing to admit a qualified "preacher, the patron had power to detain the whole fruits of the "benefice in his own hands, as is clear by the Act 1592, c. 117." And after referring to some subsequent Acts, he says, "Patrons "were excluded from the fruits of the vacancy, which were "applied to pious uses." And afterwards in IV. 24, 7, he says, "Now the patron has only the application of vacant stipends to "pious uses." *Erskine*, 1, 5, 13 and 16, puts the case of the Presbytery refusing the presentee of the patron and admitting another, and says that in such case the patron may retain the stipend, but that he can only retain as a trustee, on the footing of the present law.

It is useless to advert to other authorities which recognize the same doctrine, but the finding of the Court in Cochrane of Culross *v.* Stoddart, *Mor.* 9951, is important with reference to an argument urged by the appellant. In that case, there being a contest as to the right of patronage, the Presbytery rejected the person presented by the patron, in whom the right was afterwards found to reside, and admitted the presentee of the other claimant; and the Court found that the patron, having presented in due time a qualified Minister whom the Presbytery ought to have admitted, he had right to the fruits of the benefice notwithstanding the settlement of the other presentee, and that aye and until the vacancy should be legally supplied. The cases of Auchtermuchty, *Mor.* 9909, Moncrieff *v.* Maxtone, and Cochrane *v.* Stoddart, *Mor.* 9951; and of Lanark, *Mor.* 9954, Dick *v.* Carmichael, establish the same principle. The vacancy is treated as continuing not determined either by the rightful completed act of the patron, or the wrongful rejection and omission of the Presbytery. It was within the terms of the Act 1592, c. 17, the case of the Presbytery refusing to admit a qualified minister presented to them by the patron. The right of the patron cannot be affected, increased,

or diminished, by the greater or lesser degree of misconduct of the Presbytery. The Act of 1592 makes no such distinction, and yet the respondent rests much of his case upon these two points. First, "That upon the patron doing all that it was "incumbent upon him to do, namely, presenting a qualified per- "son, the vacancy ceased; and, secondly, That the refusal of the "Presbytery, notwithstanding the judgment of this House, gave "a new right to the patron although it did not to his presentee, "and destroyed the claim of the Widows' fund by determining "the vacancy of the stipend, although the parish continued "vacant." The answer to them is to be found in the observations already made. These positions are not only not recognised by the acts and the authorities but are in substance negatived by them. If they were recognised it would be difficult to conceive how any vacant stipend could arise, for the first six months it does not arise, and if the patron present within that period the vacancy, according to the agreement, determines, although the presentee be not admitted, and if the patron do not present in due time he cannot claim the vacant stipend. And, again, if the improper refusal of the Presbytery to admit determines the vacancy within the meaning of the term, as used in the 54th George III. c. 169, such determination must take place within the first six months, that is, before it had commenced.

One other point was put forward by the respondent in the printed papers, though little if at all relied upon at the Bar, but to which some of the learned Judges seemed to attach some weight, namely, a personal exception to the respondent, founded upon a supposed identity between the parties interested in the Widows' fund and the Presbytery, disqualifying the former from taking any advantage from the misconduct of the latter. The first answer to this is, that there is no ground whatever for such alleged identity, and if there had been, in the absence of any allegation, or proof, or probability, that the Presbytery had rejected Mr. Young in order to create a vacant stipend for the

benefit of the Widows' fund, the answer would have been that the statutes have given to the Widows' fund a right, which, by the Act 1592, is to arise from the improper act of Presbyteries, and that, in the absence of fraud, Courts of Justice are bound to give effect to this as to any other right. I therefore move that the interlocutor be reversed, and that the defendant be assoilzied from the conclusion of the action.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. And I really must say, with all respect for the Court below, (and I believe we all here agree upon that subject,) that it has never happened to us to see a case come before us which was more clear, more free from all doubt, more free from all difficulty as to the way in which it ought to be decided; so it was from the beginning and so it seems to us at the last. My Lords, the question is, as stated by my noble and learned friend, simply this, whether the terms of the Act of the 54th George III., passed in 1814, applies to a vacancy constituted and continued as the present vacancy was constituted and continued, that is to say, whether this is a case in which the vacant stipend belongs to the patron, to be by him applied to pious uses within the parish, for if so, both under the former and the latter Act, the Act of 1814, the payment of that stipend incontestibly belongs to the Widows' fund.

My Lords, I shall first get rid at once of the argument, which I must say astonished me almost more than anything I ever heard in the profession of the law, namely, the argument set up with respect to the personal exception. I think to term that absurd is not giving it an epithet beyond its value. In the first place there is no person here to be barred, because they are not the same parties. The General Assembly by a majority did a certain thing, that does not bar the Church even. But the parties interested in this fund are not the Church who have done the thing, even supposing the Church could be barred for what

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they had done judicially, but the parties here are parties claiming to be entitled to the vacant stipend on behalf of the Widows' fund. How are the Professors of the University to be dealt with in the way of *personalis exceptionis?* That is quite sufficient to sweep away at once, without saying more, this most extraordinary doctrine set up of personal exception, which, I am happy to find, was really not much relied upon in the latter stages of the cause.

Now we come to the point in the case. Can any one doubt that this was a vacancy, and can any one draw the line between a vacancy constituted in one way and a vacancy constituted in another way? Your Lordships will find by the very words of the Statutes, from the earlier Acts down to the late Acts, I refer more particularly to the Act of 1661, Chapter 52, that the vacancy in question, which entitles the patron to the vacant stipend, is not confined to vacancies, (as some of the learned persons in the Court below appear to have argued,) occasioned by death, resignation, deprivation, or transportation, but it says, or occasioned in any other manner of way, the Act is general. The Act of 1661 recites that the former Acts, namely, the old Acts beginning with 1592, gave the vacant stipend, whether "occasioned by death, resignation, deprivation, transportation, or any "other way," to the patrons; it recites that as to the former Acts, and if that were not sufficient to affix a Legislative construction upon those former Acts, which possibly it may be argued it was not, then it proceeds to enact that the same stipend whether vacant in one way or the other, or vacant in any other way, shall be given to one particular class of pious uses, viz., for the relief of Ministers who had suffered during the late troubles.

This being an Act passed in 1661, the Act of 1672, Chapter 20, gives the vacant stipend not to the same parties, the object probably having been satisfied by the payment of the vacant stipends during the intervening eleven years, but it gives the vacant

stipends to the universities. Well, therefore, may Mr. Erskine in his 4th Book, title 5, state, which he does, that if any doubt had existed as to the former Acts, vesting the vacant stipend in the patrons, not for their own benefit, but for pious uses within the parish, these two last Acts which he cites, and the words of which I have just adverted to, viz. the Act of 1661, and the Act of 1672, vested the vacant stipends in the patrons, but only to be applied by them as trustees for pious uses.

Now, my Lords, the question is, whether this is a vacant stipend. I should say that these Acts are sufficient to show, that any vacancy which continued, though occasioned by death, comes within the purview of the former Acts; and therefore, as the Act of the 54th of George III. transfers all such stipends from the patrons to the Widows' fund, making that, as it were, the pious use to which it shall be applied, I should say that that completely proves the proposition.

But let us see how it stands upon the pleadings, because that is worth considering; before going into that, however, I should remind your Lordships of what my noble and learned friend has adverted to, viz., Lord Stair's authority, which is express. I believe that it is first mentioned in Book the 2nd, title 8; but in Book 4, title 24, his opinion is more full. He says, "In *bene-*
"*ficies patronati*, the patron had a right to the teinds *sede va-*
"*cante*. But several Acts of Parliament have restricted the
"rights of patronage, and now the patron has only the applica-
"tion of vacant stipends to pious uses within the parish." I refer to page 694 of Lord Stair's Institutes.

Now, my Lords, let us just look for one moment to the statements in facts to the pleadings here, in order to see in what way these parties themselves have dealt with the question, and on looking at those pleas, I should have said that this argument which they now set up must have been an afterthought. They begin by stating very fully and very distinctly that the vacancy took place in a certain way. I am reading the revised con-

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descendence for the present appellant, Lord Kinnoull, and the Reverend Robert Young the presentee, "That the church and "parish of Auchterarder became vacant by the death of the "Reverend Charles Stewart on the 31st August, 1834." Answer for Presbytery, "admitted;" answer for Widows' fund, "admitted:" and then they go on through all the stages of the proceeding to shew in what manner the vacancy continued. Taking the whole of that together it amounts to this,—that a vacancy originated in the death of the late incumbent, was continued by the refusal of the Presbytery to admit the presentee of the patron.

But now we have this in the statement of facts for the respondent, Doctor Grant, collector of the Widows' fund, which statement, with the answer taken together, form the matter upon which we are to decide. I do think it is somewhat extraordinary that the learned persons who have considered the case at very great length and with elaborate learning, (not applied very happily to the point before them, the felicity being very small though the prolixity is very great,) should not have looked at these two lines which I am going to read, for they would have seen that the argument had no *locus standi*, this is the way it is described: "In consequence of the death of the Reverend Charles "Stewart on the 31st of August, 1834, the parish of Auchter-"arder became vacant, and remains so at the present date." From the argument, I should have thought that those who meant to maintain the present contention of the appellant, would have denied that, instead of which they say, "admitted." What have they admitted? Why, they have admitted themselves out of Court, for they say that the vacancy began with the death of the former incumbent, and that the vacancy which began with his death, continues to the present date. What become, then, of all the arguments of those learned persons who say, "It is very "true that the vacancy began by death, and was continued for "six months by death, and we do not deny that the stipend

" during that period is to be paid to the Widows' fund; but " then, all of a sudden, it adopted a new character,—it assumed " a totally different shape,—it became no longer a vacancy by " death, but became a vacancy arising from something else, " namely, from the non-reception of the patron's presentee." But it is a very remarkable thing that none of these learned persons can define the period when this marvellous change took place in the character of the vacancy; for your Lordships will find that some of them argue that it took place upon the refusal of the Presbytery, (I have shewn that that cannot be held after the statement of facts which I have read, and which is admitted; but I will presently shew that it is opposed to the authority of the case referred to by my noble and learned friend,) and at other times they seem to think that the marvellous change in the character of this vacancy took place at the time when this House affirmed the decision of the Court below. Now, in the first place, it is clear upon this admission, that this vacancy did not begin to take place at the time of the refusal of the Presbytery; for the statement is, that up to the present time the vacancy continues as a vacancy by death, and that is after the refusal by the Presbytery.

Then they will say that the vacancy took place at the time of the House of Lords deciding the Auchterarder case, that that decision terminated the vacancy which death had originated, and created a new vacancy. Suppose they put it in that way, just consider what that decision was; was that a decision that A B was the minister of the parish? Was it a decision that Mr. Young the presentee was in, and that he was the incumbent? Was it a decision that there was plenarty? No such thing. It was a decision that admitted that the vacancy continued; for it was a decision ordering the Presbytery to take Mr. Young upon trial, who might have been found incompetent upon two or three canonical grounds, which I call canonical in contradistinction to the Veto Act; that is to say, he might have been found *minus*

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*sufficiens in doctrina*, he might have been found *minus sufficiens in literatura*, or he might have been found *minus sufficiens in bonis moribus*, and he might have been rejected though your Lordships said that there was an undoubted right in Mr. Young to be admitted on trial. The decision of this House did not create a new vacancy; it only called upon the Presbytery to admit the presentee on trial. How can any mortal man say that that constitutes a plenarty, which put an end to the vacancy?

But if there was a plenarty Lord Kinnoull had no right to the stipend any more than the Widows' fund, so that really this argument, (which it is impossible to seize hold of or deal with in any other way than as I have dealt with it,) is an argument more inept, and more without foundation, than any that I ever saw raised in any case.

Now the case which has been adverted to by my noble and learned friend, of Dick *v.* Carmichael, was a very different case from the present. But the case which is first adverted to in this argument is the case of Moncrieff *v.* Maxton, the effect of which is thus given. "If Presbyteries refuse a presentation duly "tendered to them in favour of a qualified minister, against "which presentation or presentee there is no legal objection, "(which is this case,) and admit another person to be minister," (that is quite immaterial, the question is, who is in? and who is out?) "the patron has right to retain the stipend as in the "case of a vacancy." That is a very general statement; I have looked into the dictionary from which it is quoted, and I find no further account of it, but Lord Moncrieff, a very learned person, who is most diligent in his investigation of all cases, states that the sources of that case when examined into, (he must, therefore, have examined into them,) fully support that proposition. I have endeavoured to find out, in order that I might follow the justice of his lordship's remark, though by no means doubting it, what the sources are in which that case is more

fully stated. *Morrison's Dictionary* is a very useful work, a highly useful compendium, but it is in many of its articles carelessly done, and we know the history of it, that it was somewhat hastily done, and that very often the compilers were frustrated in their attempts to make the work complete. It sometimes says, "See more in Appendix," and when you look there is no appendix. In this case there is "See Appendix," and there is nothing in the appendix which says one single word upon this case, though it gives two other cases. I have therefore been unable to follow Lord Moncrieff, though I have no doubt of the accuracy of his remark, and that he had looked to the original papers in which the case was to be found.

But that is the less important, because there is the case of Lanark, or Dick *v.* Carmichael. Carmichael was a person appointed factor by the Barons of the Exchequer, acting on behalf of the Crown, the Crown being patron, and in that case your Lordships reversed the decision given against what I am going to read, and therefore set up the ground which I am now going to state, and it is most important, for it makes an end of any controversy remaining in this case. "The Court then "decreed that the stipend should remain in the patron as "vacant, or till the Presbytery admit the presentee." The Presbytery had not admitted the presentee, and therefore it remained as vacant.

Now I find that some of the learned Lords, in a very elaborate judgment, particularly my Lord Justice Clerk, (whose judgment extends over twenty pages, and I must take the liberty of saying, embraces the case without touching it,) says that he cannot see how that case applies. If his Lordship's judgment had extended over two pages, like Lord Moncrieff's and Lord Jefferey's, he very likely would have seen it without any difficulty. I do not see how his judgment applies to the case, but I see most clearly how the judgment of this House, in the case of Lanark, that is to say, Dick *v.* Carmichael, applies to the

case, because it shows that it is a vacancy, and if it is a vacancy the patron is entitled, under the Acts, as construed by us and by Stair, and the highest text writers, and as construed by a still higher authority than either, or both together, the Legislature itself, of 1661 and 1672, chapter 20, that the patron in such cases of vacancy is entitled, *ad pios usus*, to the vacant stipend. The decision lays it down that it is a vacant stipend, and it is treated, dealt with, and recognized as vacant.

Therefore, my Lords, I have no doubt whatever in this case, and I greatly wonder that it ever should have occasioned a contrary decision. I have read all the judgments in the Court below with great attention. I have read some of them with great approbation: I have read others of them with great pain; and I confess I do not think they show that a very careful and deliberate attention, (I say no more,) has been paid to the whole circumstances of the case.

LORD CAMPBELL.—My Lords, I have paid the greatest attention to this case, but I do not like to trust myself to enter into the detail of it, therefore I shall content myself with saying, that I entirely concur with my noble and learned friends who have preceded me in the construction that they have put upon the Statutes.

With regard to the objection upon the personal exception, for the credit of the administration of justice in my native country, I regret that that defence ever was set up. I still more deeply regret that any weight was given to it by any of the learned Judges.

Ordered and adjudged, That the interlocutor complained of in the appeal be reversed, and that the appellant defender be assoilzied from the whole conclusions of the action of declarator, and that the said respondent do repay to the said appellant the costs decerned for by the said interlocutor appealed from, if paid by the said appellant, and

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do pay to the said appellant the costs incurred by him in the Court o Session: and it is also further ordered, that the said cause be remitte back to the Court of Session in Scotland, to do therein as shall be jus and consistent with this judgment.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Agents.

[17*th April*, 1845.]

MRS. JANET DINGWALL and OTHERS, *Appellants.*

ALEXANDER DINGWALL and OTHERS, *Respondents.*

*Tailzie.—Irritant Clause.*—Terms of irritant clause, *held* broad enough to embrace all the prohibitions in the entail.

*Ibid.—Resolutive Clause.*—A clause resolving acts done in contravention of the said "conditions and provisions," *held* to embrace prohibitions described as "limitations and restrictions."

ON the 8th of October, 1778, John Dingwall, of Rannieston, executed an entail of his lands in favour of a series of heirs, "but "always with and under the conditions, provisions, limitations, "restrictions, clauses irritant and resolutive, declarations, powers, "and faculties after-written, viz."—There then followed a clause requiring the heirs to use a particular surname and arms, which was prefaced by the words, "under this condition and provi- "sion;" and two other clauses requiring the heirs to possess under the entail, and to procure themselves early infeft, and obliging them to insert in their infeftments "the several con- "ditions, provisions, limitations, clauses irritant or resolutive, "and declarations before and after mentioned;" each of these clauses being prefaced by the words, "with and under this con- "dition." The entail then contained the following prohibitions:

"And with and under this further limitation and restriction, "that it shall not be lawful to nor in the power of the said "Arthur Dingwall, or of any of the heirs of taillie and sub- "stitutes called to this succession, to alter, innovate, or change, "this present taillie, or the order of succession before pre- "scribed, or to do or grant any fact or deed that may import or

" infer any alteration, innovation, or change, of the same, directl
" or indirectly: And with this further limitation and restrictior
" that it shall not be in the power of the said Arthur Dingwa
" nor of any of the heirs of taillie or substitutes, to sell, alienat
" impignorate, or dispone, the said lands and estate, or any par
" thereof, either irredeemably or under reversion, nor to burthe
" the same, in whole or in part, with debts or sums of money
" infeftments of annual rent, or any other servitudes or burthen
" whatsoever, (except as hereinafter excepted,) nor to do an
" other act or deed, civil or criminal, directly or indirectly, i
" any sort, whereby the said lands and estate, or any part thereof
" may be affected, apprized, or adjudged, forfeited, or becom
" escheated or confiscated, or any otherwise evicted from th
" heirs of taillie, or this present entail, or the order of successior
" herein contained, prejudged, hurt, or changed; and with and
" under this condition and provision, that it shall not be in the
" power of the said Arthur Dingwall, or the heirs of taillie and
" substitutes before mentioned, or any of them, to set tacks o
" all or any part or portion of the said lands for a longer space
" than nineteen years, and the lifetime of the granter, or for the
" space of thirty years certain from the commencement."

There then followed clauses prohibiting the granting of leases except upon specified terms, and excluding the terce and courtesy of the heirs, each of which clauses was preceded with the words, " and with and under this condition and provision."

The prohibitions were fettered by the following clauses:

" And farther, with and under the conditions, and under
" these irritancies, that in case the said Arthur Dingwall, or any
" of the substitutes or heirs of entail, shall contraveen the before
' written provisions, conditions, restrictions, limitations, and
" others herein contained,—that is, shall faill and neglect to obey,
" fulfil, or perform the said conditions and provisions, or any one
" of them, or shall act contrary thereto, then and in any of these
" cases the person or persons so contraveening, failling to per-

"form, or acting contrary as said is, shall, for him or herself "only, *ipso facto* amitt, lose and forfeit all right, title, and "interest he, she, or they have to the said lands and estate, and "the same shall devolve, accresce, and belong to the next heir of "taillie appointed to succeed, albeit descended of the contra- "veener's own body, in the same manner as if the contraveener "was naturally dead: and with and under this irritancy, as it "is hereby provided and declared, that in case any adjudication, "apprising, or other legall diligence, shall happen to be obtained "or used for or against the fee or property of the said lands and "estate, or any part thereof, upon any debts or deeds of the said "Arthur Dingwall, or for any debts or deeds of any of the other "substitutes, or heirs of entaill, done or contracted before or "after their succession, to the said lands and estate, not only "shall such debts and deeds, with the adjudications, apprisings, "or other legall diligence, be void and null, in so far as they may "affect the said lands and estate, or any part thereof: but also "the said Arthur Dingwall, and the whole substitutes and heirs "of entail respectively, upon whose debts or deeds done or con- "tracted as aforesaid, such diligence has proceeded, shall *ipso* "*facto* forfeit his or her right to the said lands and estate, and "the same shall devolve, fall, and accresce, to the next heir of "taillie, in the same manner as if the contractor of such debts, "or the granter of such deeds, were naturally dead, and that free "and disburthened of such debts and deeds, adjudications, "apprisings, or other diligence led and deduced thereupon: and "with and under this farther irritancy, that in case the said "Arthur Dingwall, or any of the substitutes or heirs of entaill "succeeding to the said lands and estate, shall committ the "crime of treason, or any other crime, and shall be lawfully con- "victed thereof, whereby the said lands and estate may become "forfeited and caduciary, the said heir or heirs so convicted shall, "for him or herself, and for all his or her descendants, *ipso facto* "forfeit, amitt, and lose all right and title they had to the said

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" lands, and the same shall accresce and pertain to the next heir " or member of taillie not descending of the contraveener's body, " in the same manner as if the contraveener and the whole " descendants of the contraveener's body were naturally dead; " and it shall be free and lawful to the said next heir and member " of taillie to establish his or her right to the said lands, in the " same manner as hereinafter directed with respect to other irri- " tancies."

After a clause, giving the heirs power to make liferent provisions to their wives and husbands, but excluding any to younger children. There then followed this clause:

" And also with and under this provision and condition, as it " is hereby expressly provided and declared, that upon every con- " travention that may happen by and through the said Arthur " Dingwall, or any of the substitutes and heirs of entaill their " failling to perform all and each of the conditions, or acting " contrary to all or any of the restrictions, it is hereby expressly " provided and declared, that not only the said lands and estate " shall not be *burthened and liable* to any of the debts and deeds, " acts and crimes of the said heirs of taillie, but also all such " debts, deeds, and acts, contracted, granted, done, or committed " contrary to these conditions and restrictions, or to the true " intent and meaning of these presents, shall be of no force, " strength, or effect, and shall be unavailable against the other " substitutes and heirs of taillie, and who, as well as the said " estate, shall be nowise burdened therewith, but free therefrom, " in the same manner as if such debts or deeds had not been " contracted, made, granted, or committed."

Alexander Dingwall, the heir in possession under the entail, sold the lands, but the purchaser raising a question as to his right to do so, he brought an action, (which on his death was insisted in by the appellant,) against the heirs of entail, to have it declared that the entail was not fenced against sales and alienations.

The respondent, the next heir of entail, appeared and put in

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defences to the action. The Lord Ordinary ordered cases by the parties, which he reported to the Court by whom they were ordered to be laid before the Judges of the other Division of the Court and the Lords Ordinary for their opinion. Upon receiving these opinions, the Court on the 26th of February, 1842, pronounced the following interlocutor:—

"The Lords having advised this action of declarator and "revised cases for the parties, and heard counsel,—find the "objections stated to the validity and effect of the entail in "question unfounded and groundless, therefore dismiss the action "of declarator; assoilzie the defenders from the conclusions "thereof, and decern; find the pursuer liable in expenses to the "defender, and remit the account thereof to the auditor to tax "the same, and report."

The appeal was against this interlocutor.

*Mr. Kelly* and *Mr. Anderson* for the appellant.—Although the irritant clause sets out with words of general signification, the declaration immediately following is limited to debts and deeds of a nature to burden the lands, and the declaration of irritancy is of "*such* debts, deeds, and acts," which, by the recognised rules of construction, must limit the irritancy to the deeds, debts, and acts mentioned immediately before, viz., those burdening the land. Not only so, but after declaring that the debts, deeds, and acts, shall not be effectual against the heirs, the clause goes on to say, that the lands shall not be "burdened" therewith. The clause must in strictness, therefore, be confined in its application to deeds and acts of that nature, and cannot be extended to embrace sales. That it ought to be so limited is confirmed by reference to the other clauses of the deed, where "burdening or "affecting" the lands is the matter specially provided against, Lang *v.* Lang, *McL.* & *Rob.* 871. Sharpe *v.* Sharpe, 1 *Sh.* & *McL.* 623. The terms, "burdening or affecting" the lands, have in more instances than one, been held not to apply to sales. Breadalbane *v.* Campbell, 2 *Rob.* 109. Sinclair *v.* Sinclair,

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3 *D. B.* & *M.* 636. But, further, the irritant clause is also defective in not declaring the matters done in contravention to be absolutely null, but merely that they shall not be available against the heirs, or burden the lands. Sharpe *v.* Sharpe, 1 *Sh.* & *McL.* 622.

The resolutive clause also is ineffectual to prevent sales, because it is limited to acts in contravention of "the conditions "and provisions" only, omitting "limitations and restrictions," which in this deed are used in a sense contradistinguished from "conditions and provisions," and selling is classed by it under limitations and restrictions. No doubt the clause sets out with embracing the whole clauses, but it afterwards, by the words "that is," assumes the form of enumeration, and in that enumeration, embraces only "conditions and provisions."

*The Lord Advocate* and *Mr. Turner* for the respondents, (were informed by the House that they need not trouble themselves as to the resolutive clause).—It must be admitted that, but for the use of the word "such," sales would have been struck at by the irritant clause; and why so, but that the words used are sufficiently broad to include them. In those cases where words of similar import to those used here have been held not to include sales, it was, because the previous part of the clause recited prohibitions which did not relate to sales; but here, the clause sets out with words of the broadest and most general import,—"failing to perform all and each of the conditions." Assuming the appellant to be correct in the meaning he imputes to "burdened and liable," the clause does not stop there, but goes on to declare, that all "*such* debts, deeds, and acts," &c., that is, all debts, acts, and deeds in contravention. But "bur-"dened and liable" have not the limited meaning which is sought to be attached to them; they apply to all acts by which the lands may in any way be affected.

LORD COTTENHAM.—My Lords, if I felt that in this case

there was any danger of running counter to any decision of this House in former cases, I should have thought it necessary that we should take time for consideration, in order to be quite sure of the grounds upon which we proceeded, but it appears to me that this case depends on its own circumstances, and is not in the least affected by any of those rules and principles laid down in former cases, which have been referred to.

It appears to me that the whole turns upon the construction of the clause in question, for if that clause does embrace all matters before prohibited, then there is an end of the argument on the part of the appellants. Upon looking at the clause I think it does. There is no doubt that a sale is prohibited. That is one of the restrictions, or one of the provisions, (by whatever term it is decribed,) to be found in the earlier part of the settlement. Then how does the settlement proceed? "And "also with and under this provision and condition, as it is "hereby expressly provided and declared that upon every con- "travention that may happen by and through the said Arthur "Dingwall, or any of the substitutes and heirs of entail, their "failing to perform all and each of the conditions, or acting "contrary to all or any of the restrictions, it is hereby expressly "provided and declared, that not only the said lands and estate "shall not be burthened and liable to any of the debts and "deeds, acts and crimes, of the said heirs of taillie, but also all "such debts, deeds, and acts, contracted, granted, done or com- "mitted, contrary to these conditions and restrictions, or to the "true intent and meaning of these presents, shall be of no force, "strength, or effect, and shall be unavailable against the other "substitutes and heirs of taillie, and who, as well as the said "estate, shall be nowise burthened therewith, but free there- "from."

Now it has occurred, (and that is the only ground upon which any argument can be built,) that in certain cases the terms "debts and deeds," to be found in a clause referring clearly to

incumbrances or burthens thrown upon the land, have been construed not to extend the meaning beyond that which was clearly confined to burthens upon the land. So that where we refer to burthens upon the land, and then find the words "debts "and deeds" following, the debts and deeds so to be understood by those expressions are to be confined to that which the sentence before contains. But there is another rule which is equally clear, arising from decided cases, that the words "debts "and deeds," where they are not so confined by referring to instruments which are limited to burthens on the estate, will embrace all acts, all debts, and all deeds before prohibited.

Then do these words "debts and deeds" fall within the one or other of those classes of cases? We decide this case without touching upon nice distinctions. We find, after the prohibition of sales, a clause commencing with a clear and distinct reference to all matters before prohibited, and then it says that "the estate shall not be burthened or liable to the said debts "and deeds, acts and crimes." Is the term "deeds" to be confined to debts, when the very sentence enumerates all matters prohibited.

So that taking the first part by itself, if it had not been aided by what is found in the subsequent part of the clause, I should have said that within the principle of decided cases, and according to the common sense and obvious meaning of the terms, the "deeds" here referred to are deeds prohibited in the early part of the instrument.

We come, then, to the further clause, and I give the appellants the benefit of the argument that the word "such" must be explained by the antecedent. What is the antecedent? The antecedent is "deeds." If, therefore, we get a construction from the word "deeds" extending it beyond burthens upon the land, although the appellant has the benefit of the reference, he gets ultimately nothing by it, because the matter referred to extends beyond that to which he wishes to confine it. "But all such

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"debts, deeds, and acts, contracted, granted, done, or committed "contrary to these conditions and restrictions, or to the true "intent and meaning of these presents, shall be of no force." It is argued that that cannot extend the meaning of the prior part of the clause. But it is extremely useful in construing that sentence of which it forms a part, showing that the intention was not to limit it to debts and deeds, the words being clearly large enough to go beyond burthens upon the land, and showing that the object of this clause was to deal with all matters prohibited, "all debts, deeds, acts, and crimes before prohibited;" and not to confine it to what may be strictly burthens upon the land.

If that be the correct construction of the clause the only ground upon which the argument for the appeal can be supported fails, being founded as it is upon the supposition that by the true construction of that clause the term "debts and deeds" ought to be confined to that which constitutes strictly debts or burthens upon the land. Being of that opinion, I cannot doubt that the judgment of the Court below was correct.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. I have looked into the Hoddam case, as I have done over and over again, and I have looked into the other cases, and those cases do not furnish any ground for the argument in support of the appeal. I do not see the slightest inconsistency between the decision in the Hoddam case, or what was said in that case, and the present case, because the case there was an admission of the very thing upon which this case rests. Here it is not merely that the lands are declared to be not liable and not burthened, but there is also added, that all those things of whatever kind, not merely debts, and incumbrances, and burthens, but "deeds, acts, and crimes," all those things shall be null and void, and of no effect. The large enumeration of the prohibitory clause has been referred to by my noble and

learned friend. I am clearly of opinion that the judgment should be affirmed.

LORD CAMPBELL.—My Lords, I agree that we may safely dispose of this case immediately, and that it is proper that we should take that course; for I have no doubt at all, that giving to this clause its natural and grammatical meaning, it is free from all doubt.

My Lords, I perfectly concur in the doctrine that has been laid down upon the part of the appellant, that where there is any doubt that doubt is to be construed in his favour, but where there is no doubt we are bound to give effect to the law as it stands, and to allow the entail to be preserved.

My Lords, for the reasons that have been stated by my noble and learned friend, who first addressed your Lordships, it is quite clear to me, that this irritant clause comprehends in the most express terms, every prohibition that is to be found beforementioned, and without detaining your Lordships by again going over the grounds, it is quite clear to me that the meaning of the entailer is expressed in language which, in giving to that language its natural and grammatical import, carries into effect the intention he entertained.

My Lords, since I have had the honour of being a member of your Lordship's House, and have taken a part in these discussions, I have had occasion to review almost all the cases upon these subjects, and to lay down the principles which I think ought to govern your Lordship's decisions upon Scotch entails. I abstain from repeating what I have before said, and from referring to any case except the Hoddman case. I will only make an observation to explain that case, and to save your Lordships from the infliction of that case being again brought forward as an authority for what it does not in the slightest degree prove.

Nothing can be more fair than the course upon which the

learned gentleman who drew the appellant's case has proceeded; for he has set out in parallel columns, the irritant clause in the Hoddam case, and in the case now before your Lordships. They are very fairly set out. In the case at bar there is a perfect sentence, with the nominative, verb, and accusative, everything round and complete, admitting of no sort of doubt. We know what is irritated in this case. We know that everything is irritated that is prohibited. Now, when we come to the Hoddam case, we do not know what is irritated at all, because when we come to the word "acts," it is quite clear, looking at the deed merely *ex facie*, without enquiring as to the history of the case, that something was omitted. Therefore you do not know what is the nominative. The words are, "contrary to "these conditions and provisions, or restrictions and limitations, "or to the true intent and meaning of these presents shall be of "no force, strength, or effect." You cannot, in the slightest degree tell what is to be of no strength or effect, because the nominative is omitted. I had the honour to argue that case I think three times at the bar of your Lordship's House. It was not contended that without some interpolation, that could be a perfect irritant clause, but it was said that the necessary mode of supplying it was by introducing words, that all is to be included which is contained in the prohibitory clause. That was one mode of filling up the blank. Another mode of filling up the blank was to shew, that merely the acts of the substitute were to be irritated. Upon that ground, and that ground alone in the Hoddam case the entail was held to be defective, and I shall lament, if after this attempt once more to explain the grounds upon which the House proceeded, the Hoddam case should be again cited as an authority to prove that which it has no tendency at all to establish.

My Lords, not to detain your Lordships with any further observations, I think the irritant clause is abundantly sufficient; upon the resolutive clause we stopped the respondent's counsel,

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thinking that it did not admit of any argument, and I think upon due consideration, that the irritant clause is equally sufficient, and therefore I entirely concur with the motion that has been made in this case, that the judgment of the Court below be affirmed.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed with costs.

[Heard 18*th April*, 1845.]

CHARLES FERRIER, Accountant, Edinburgh, *Appellant.*

DR. WILLIAM P. ALISON, and others, Trustees of Elizabeth Hood, Deceased, *Respondents.*

*Arbitration.—Expenses.*—An arbiter, in an extrajudicial submission, has power to award expenses, without any express power to that effect being inserted in the deed of submission.

THE parties in this case entered into a deed of submission limited to matters which were specially recited in the deed, and in which no mention was made in any way as to the costs of the reference. The arbiter, in making his decree, included an award against the appellant for the expenses of the reference, and of recording the submission and the decree.

The appellant brought a reduction of the decree upon this among other grounds, that the arbiter had no power to award expenses, as no such power was given him by the deed of submission.

The respondent pleaded in defence that an arbiter could award expenses without any special power to that effect.

The Lord Ordinary, on the 22nd November, 1842, repelled the reasons of reduction, and the Court, on the 28th January, 1843, adhered to his interlocutor.

The appeal, which was against these interlocutors, embraced the whole grounds of reduction, but the question, as to the power of the arbiter to award expenses, was the only point which requires notice.

*Mr. Turner* and *Mr. Anderson* for the Appellant.—An arbiter's power is to be found within the deed of submission, and

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cannot go beyond it. The power to award expenses is not incidental to the office, and is no exception. In Robertson *v.* Brown, 15 *Sh.* & *D.* 199, the only case upon the subject, the question was raised and decided certainly in favour of the power being incidental, but the judgment there went upon the authority of Berry *v.* Watson, 6 *Sh.* & *D.*, and Fairley *v.* Mc Gowan, 14 *S.* & *D.* 470, cases of judicial reference, which rest upon a totally different principle. In these an action is referred, and the arbiter comes in place of the Court to the effect only of ascertaining the rights of the parties. His decree requires in order to make it effectual to have the authority of the Court interponed to it. He acts by the delegated authority of the Court, which may be said never to part with its jurisdiction over the case. The powers which the Court has may well be supposed to be transferred to the arbiter, without its being a necessary consequence that such power exists in him independently of the Court, as incidentally inherent to his office. The Court below seems, in the case of Robertson, to have proceeded on the idea that, as Courts possessed the power, therefore an arbiter must posess it; but in this they forget that Courts, even, possess it only by virtue of express statute, and that an arbitration is not only not similar to an action, which is always hostile in its nature, but is a friendly contract, entered into expressly for the avoidance of the charges and delay of a judicial proceeding. If the law were as supposed, the Books of Style would contain the forms of a clause for excluding the power of the arbiter to award expenses, where it is not intended that he shall possess it; but no such clause is to be found in the Juridical Styles, on the contrary, it is there stated, (vol. ii.,) that where it is intended to give the arbiter this power, a clause is inserted for the purpose, and the form of such a clause is given. And *Parker*, in his work on arbitration, p. 131, a work which may be referred to as evidence of the practice, says, it is the general understanding in Scotland, that such a clause is necessary.

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The *Lord Advocate* and *Mr. Burge.*—The Juridical Styles, if they can be looked to as an authority at all, prove too much; for they lay down, that in submissions of depending actions, if it is intended to give the arbiter power to award expenses, a clause to that effect should be inserted in the deed of submission, and the form of clause is accordingly given; but indisputably, by the law of Scotland, arbiters in judicial references have power to award expenses without any express power to that effect. This was found in Berry *v.* Watson, 6 *Sh.* & *D.* 256, and 9 *Sh.* & *D.* 337; in Smith *v.* Banks, 8 *Sh.* & *D.* 920, and in Fairly *v.* Mc Gowan, 14 *Sh.* & *D.* 470. And the doctrine was laid down in these cases in sufficiently broad terms to embrace cases of extra-judicial reference. That the Court so intended to deliver itself is shewn by its judgment in Robertson *v.* Brown, 15 *Sh.* & *D.* 199, which was a case of extra-judicial reference, where the question as to this power was expressly raised and decided. There the Court proceeded, not only on the authority of the cases which have been referred to, but of the civil law, which generally, where municipal precedent is awanting, is good authority, and was specially relied upon as to the matter of costs in those cases which raised the question as to the power of the Court to award expenses where none were concluded for by the summons. The Court sustained its power in that respect, not only upon the statute 1652, but upon the civil law which is express upon the subject, and is equally so as to the power of arbiters. *Voet.* iv. 8, in the title "De receptis," intimating what arbiters may do without express authority, says, "Non tamen adeo angustis cancellis concludenda fuit arbitri "auctoritas, quin condemnationem faciens diem solutioni pera- "gendæ possit statuere in expensas temerarium litigatorem, "damnare ac contumaciam ejus pecuniaria punire pœna:" and *Lauterbach*, in Disputation 10, says, "et de accessoriis, v. gr. "fructibus usuris et expensis licet illorum in compromissio nulla "facta sit mentio arbitri sententiam valide dicere possunt:" and in the *Dig.* iv. 8, 39, in the law beginning "non ex omnibus

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" causis," it is laid down, " Idem contumaciam litigatoris arbi
" punire poterit pecuniam eum adversario dari jubendo."

*Mr. Turner* in reply.—The civil law, no doubt, is of a cert
authority in the law of Scotland, but only in so far as it has b
adopted and recognised, for the two laws are not identical, nor
every respect corresponding, of which this matter of costs is
instance.

[*Lord Brougham.*—I won't say what might have been
authority of the civil law had there been no decision, but it
very important as throwing light on Robertson's case.]

By the civil law, Courts had inherently a power to aw
costs, whereas in Scotland they had no such power until the
1652 gave it to them. And in arbitration, arbiters, by the v
passages cited by the respondent, had power from time to ti
to impose fines upon the parties; but it is not pretended t
such a power has been adopted into the law of Scotland.
the civil law, decrees arbitral could not be opened up for inj
tice or iniquity, whereas, by the Act of Regulations, sec. 25, t
may be challenged for corruption, bribery, or falsehood.

LORD CAMPBELL.—My Lords, in this case, with respect
the question of costs, I confess that I have entertained so
doubt. According to the law of England it is quite clear t
an arbitrator has no power to award costs, unless that power
expressly given him by the submission; he has no such po
incidentally as arbitrator, and I confess, my Lords, that
seems to be the more reasonable rule. There are many case
which it may be fit to refer disputes to arbitration, in which
parties would not render themselves liable to costs to be me
out by the arbitrator. There are many others in which i
very fit that that power should be enjoyed by an arbitra
But then it seems to me, my Lords, to be more expedient t
the submission, which is the contract between the parties
submit their disputes to a Judge constituted by themsel

should state that their Judge shall have this power if they mean that he shall enjoy it, and to say that he shall not have that power, if from the nature of the dispute between them it is not wished that he should exercise it. It is very easy in a submission to introduce a clause giving a power to the arbitrator to award costs, if it is wished that that power should belong to him, and it admits of great modification, where there are several parties, as to the manner in which he is to exercise that power; and I should think that, generally speaking, it is better that that power should be expressly given in the authority by which he is to exercise his judicial office.

My Lords, we have, however, to consider what is the law of Scotland upon this subject, and it may be, that although the law of England gives no such power incidentally to the arbitrator, the law of another country may give that power incidentally, and it appears to me to be clearly proved that the law of Scotland does give it incidentally. We have one case in which the question was expressly decided, and decided unanimously by the Judges; I refer to the case of Robertson *v.* Brown, which was identically this case, as far as the power of the arbitrator to award costs is concerned. That was not a judicial reference; that was not a reference of a cause depending in Court; but it was a general reference, such as this which we are now considering, and there, after long debate, and the case had been ably argued by two most eminent counsel, the present Lord Justice Clerk, and another most eminent counsel, and after they had been heard and all the authorities had been brought before the Court, the Court came unanimously to the determination, that this power incidentally belonged to the arbitrator.

Then, my Lords, there were other cases in which not exactly the same point arose, but in which the same doctrine was discussed. There was the case of Berry *v.* Watson, which certainly was a reference of a cause, and there, although it was not a judicial reference, it was held that the arbitrator had the power not only

to award the costs of the process, (the costs of the action as we should say,) but the costs of the reference. It was said that the point was not distinctly made. Why, it is quite clear that both those points arose, whether he had the power to award the costs of the reference, and whether he had the power to award the costs of the cause.

Then, my Lords, there was the case of Smith *v.* Banks, which certainly was a judicial reference. There was further, the case of Fairley *v.* Mc Gowan, which I think was likewise a judicial reference. But these cases laid down the general principle, that this power incidentally belongs to the arbitrator.

Well then, my Lords, what is there upon the other side? *Mr. Turner*, referring to text writers, has stated that *Stair* and all the great authorities of the law of Scotland are upon his side. *Mr. Parker*, I dare say, is a very respectable gentleman, but his work cannot be cited as an authority; we may look to his book to see what is the practice now existing, but he cannot at all be considered as an authority or a text writer to whose opinion any weight can be given, and he only talks doubtfully, and refers to the law of England, which he rather prefers, as I do, to the law of Scotland. But we cannot at all set up his opinion against these solemn judicial decisions.

With regard to the Juridical Styles, these go in express contradiction of the decisions of the Supreme Court, because when the precedent is examined, it refers to a judicial reference, at all events to the reference of a cause that is depending, and according to the opinion of the compilers of that Book of Styles, if you are to give the arbitrator the power of awarding costs where a cause depending is referred to him, it must be expressly mentioned. Now, that is contrary to the cases that have been solemnly determined by the Supreme Court in Scotland. Therefore there is, I consider, no authority whatsoever to meet those that have been relied on.

But, my Lords, I attach very great consequence to those

texts of the civil law which have been brought before us, for they shew that those decisions of Robertson *v.* Brown, Berry *v.* Watson, Fairley *v.* McGowan, and Smith *v.* Banks, have that excellent foundation, the civil law, to rest upon. Mr. Burge has, with his usual industry and learning, laid before us authorities that clearly prove such to be the doctrine of the civil law. We have got the text of the Digest itself, which certainly does not say in so many words, that if there be a general reference to arbitration, the arbitrator has the power to award costs without that being in the submission, but it gives a power which is superior to awarding costs to the arbitrator, namely a power of calling upon either party during the progress of the submission or arbitration, who misconducts himself, so that his opponent is prejudiced, to make compensation to his opponent for the loss thus occasioned. That is a greater power which would comprehend the less power that we are now considering. Now, when we come to the Commentators upon that text, they in so many words lay down that without this power being expressly conferred by the submission it is possessed by the arbitrator.

Under these circumstances, I think there can be no doubt whatever that we are bound to affirm the decision of the Court of Session upon this subject. When we find their unanimous decision founded upon the texts of the civil law, it would not become us to follow our notions as English lawyers, or any speculative preference of one doctrine to another. We are bound to declare what the law of Scotland is; and I think it is proved to our entire satisfaction, that by the law of Scotland where there is a general reference, although there is no express power given to the arbitrator to award the costs, that power he is possessed of.

Under these circumstances, my Lords, I think we are bound to affirm the judgment, and I take the liberty of moving your Lordships, that the interlocutor be affirmed with costs.

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LORD BROUGHAM.—My Lords, I entirely agree in the view that has been taken by my noble and learned friend. I certainly, during the early part of the argument, did entertain considerable doubts, because it appeared to be contrary to our notions here, which led us in the first place to doubt, upon a matter too more likely in the two countries to be dealt with upon the same principles, than if it had been a question of feudal law, where the divergence of the two systems has been very great. It appeared that there was only one case, Robertson *v.* Brown; and that case did seem to have been disposed of without very great consideration, at all events, the record and the reports of the decision do not give us the reasons with any fulness, and the Court did appear in that case to refer to two other cases, which might have special circumstances connected with them, namely, being cases of judicial reference. However, when it comes to be looked into, it appears that one of them, though a reference of a process pending, was not a judicial reference; consequently, that in a certain degree goes to set up Robertson *v.* Brown. Robertson *v.* Brown is, however, a decided case. It is clear; it is unhesitating; it is upon the point; and it is the only case distinctly upon the point, namely, of a general submission; it is a case that never has been broken in upon either by the authority of any *dictum* of the Court *arguendo*, and much less by any contrary decision setting it aside; nor has it ever been set aside by anything that has passed here in the Court of Appeal, the Court of last resort. That, therefore, would of itself have been sufficient to have made one pause before coming to a conclusion against the present decision, strengthened as it is by and resting upon Robertson *v.* Brown; when I recollect, too, that there is no decision the other way at all, nor any authority, for I wholly deny the authority of Mr. Parker's book. This is not, properly speaking, a question of practice, upon which you may look into the works of living authors, as you would look into the books of Mr. Tidd and Mr. Chitty, and perhaps Mr. Archbold also, this is not a question of

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practice; it is a general question of law, namely, has or not an arbitrator, empowered by, and acting under the authority of a general submission, without any express authority, the power of awarding costs of the cause and the submission. Now there is no authority whatever, except the doubtful dictum of Mr. Parker, upon this subject, who, be it observed, refers to the English law, but who, in his reference, has not given a very accurate account of the English law. His account of the English law is by no means remarkable for its accuracy; but that would be nothing, because we are upon a question of Scotch law.

Therefore, my Lords, that case standing uncontradicted by any other authority whatever, we are now to look to the foundations of the Scotch law, the fountains from which it was drawn, on submissions to arbitration; and those fountains are the civil law. Nothing can be clearer than the authorities referred to. The 39th law of the 4th book of the *Pandects*, title 8, is not in express terms with respect to the arbitrator's power of awarding costs, but it distinctly ascribes to him the larger power of punishing or inflicting a pecuniary penalty upon the parties for their misconduct in the suit, or in that out of which the suit has arisen. Now that is a larger power than the power of giving costs, and it appears to have well authorised the construction put upon it by the commentators, particularly Voet, the greatest of those commentators; and when I say "well "authorised" it, I mean authorised it just as well as ninety-nine in a hundred, you may say, of the inferences of those commentators are authorised, which are derived from the text of the *Digest;* for you shall much more easily find all the English law laid down by Lord Coke from the decisions of cases and the authority of Littleton, and the conclusions he deduces from those cases, than you shall find very many of the dicta, or rather of the authoritative statements of Voët, Vinius, Zoesius, and others of those great commentators, upon the text of Justinian's *Institute*, the *Pandects* and the *Code*. The *Code* I have not had an

opportunity of looking into, but the *Pandects* I have looked into. I have been prevented from looking into the *Code*, because the library of this House is so admirably well furnished that it has Heineccius but it has not Justinian. That is the peculiar feature of our selection, that to the fountains of all civil law we have not access. But the text of the *Pandects* themselves is quite sufficient, according to the course of the commentators, to justify their commentary, but their commentary is authority independent of the text, and if a text is found in Voet or in Vinius, and particularly in Voet, it is law, and would be citeable in any Court in Europe as making the civil law, unless a contrary text in Voet was to be found, whether it is strictly traced to the text of Justinian or not, just as many things are held to be undeniable by the authority of text writers to deduce the English law from statutory enactments, though when you come to look at those statutory enactments you find that they have made a very great step, in order to get at their conclusion; still we go not merely to the statute itself, but we go to the text writers' authority, as expounding that statute. Now nothing can be clearer than both those passages which have been cited by Mr. Burge from Voet and Lauterbach, for they most distinctly state that the arbitrator has, without any *compromissum* authorising him or empowering him, the authority to give the costs, for Voet first gives the cases where he is not authorised, for want of the *compromissum*, and then he says, "Non tamen "adeo angustis cancellis concludenda fuit arbitri auctoritas, quin "condemnationem faciens diem solutioni peragendæ possit sta-"tuere in expensas temerarium litigatorem damnare ac contu-"maciam ejus pecuniaria punire pœna." But he has much power beyond those, meaning to say (for it amounts to this) though there should be no submission, though there should be no authority given him *per vires compromisi*, he has the power of punishing, as the 39th law of the *Digest* says, and he has the power of punishing contumacy *pecuniariis pœnis*.

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My Lords, for these reasons I am of opinion that the case of Robertson *v.* Brown is authorised by the principles of that law from which the law of arbitrament and award is taken by the law of Scotland. With respect to the authority of the Juridical Styles, most undoubtedly it looks as if they thought it was the course of proceeding to arm the arbitrator with authority, and perhaps it may be, but it by no means follows that if he is not armed with authority, he has it not *per placitum* by the general rules of the common law.

Upon the whole, therefore, I entirely agree in the view that has been taken by my learned and noble friend, and hold that the decision having been rightly come to in the Court below, your Lordships ought here to affirm it with costs.

LORD COTTENHAM.—My Lords, the appellant complains of the award, and seeks to set it aside, upon the ground that the arbitrator has exceeded his authority and jurisdiction in having awarded the costs of the reference, and he here, by his appeal, complains that the Court of Session have failed in the performance of their duty, in not giving him a decree setting aside that award. The very ground, therefore, of the appellant's case upon the question of costs is, that by the law of Scotland the arbitrator has no such jurisdiction. Making that complaint it is for him to establish the position that, by the law of Scotland, no such power existed in the arbitrator, from want of express reference in the contract of the parties giving him that jurisdiction, and our inquiry is, how the matter stands upon the question, whether by the law of Scotland such a power is vested in the arbitrator, where there is no express contract to give him that power.

Now, my Lords, there is not much to be found under the references that have been made to the early period of the Scotch law. If there had been no authority at all upon the subject, either one way or the other, then no doubt the references which

have been made to the civil law would have been of extreme importance, and they are very important as the matter stands, because they do show a very substantial and sufficient foundation for what, we are informed by the Judges of the Court of Session, is the course of practice and the law of Scotland upon this subject.

Now, my Lords, the first case in point of date which has been referred to is that of Berry *v.* Watson, which was in the year 1827. I consider that as an authority going to the full extent of the present case, because although it is perfectly true that, in that case, there had been a suit between the parties, it was not a judicial reference within the meaning of that term. The parties agreed to put an end to the suit, and the terms of a reference were agreed to. That, however, was not immediately acted upon, but another document was drawn up, which stated that the parties had agreed to hold this as a concluded suit, and the subject matter of that suit so concluded by contract between the parties, was referred to arbitration. It was not, therefore, a case at all open to the observations which have been made upon some of the other authorities referred to, where there was a reference of a suit, keeping the suit alive and merely using the reference for the purpose of ascertaining some points between the parties; it was a determination of the suit, and a new and distinct reference to the arbitrator.

Now it is important, not only to see what was decided in that case, but the grounds upon which the Court put their decision when the matter was brought before them. The arbitrator in his award gave the costs of the proceedings, or the costs of the reference, as we should call it, and that was challenged, and a bill of suspension having been brought in order to set aside that award, certain conclusions were come to by the Court. The argument was, that expenses were concluded for in the action submitted. Then came this general proposition, "that both in "actions and in submissions expenses may competently be

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"awarded, though not concluded for or specially submitted, and "that in practice arbitrators always award expenses in such "cases." Assimilating the case of a summons not concluding for costs, in which the Courts say that the Courts have jurisdiction as to costs, and the other case of there being a reference without mention of costs, in which they say the arbitrator has, notwithstanding, authority to award costs, and that such is the practice. My Lords, in inquiring what is the law of Scotland and what is the practice, we have the unanimous opinion of the Judges of the Court of Session, pronounced in 1827, that the practice of the Court and the law of Scotland is directly the reverse of that for which the appellant contends, and which he must establish in order to entitle him to have the judgment of the Court of Session in this particular case reversed. We not only have the decision in that case that it was competent to the arbitrator, although it was not a judicial reference, and although there was no contract to refer the costs, but we are told that it is as much of course that the referee, although there be no contract for him to adjudicate as to the costs of the proceeding, has power so to do, as it is to award costs, where a summons has no conclusion relative to the costs of the proceeding. The decision, therefore, goes upon the general principle, it is not a decision proceeding upon the particular circumstances of a particular case, and it does lay down a rule applicable to the present case.

My Lords, I pass over those cases which are cases of judicial references. No doubt they are distinguished and open to observations which may prevent them from being directly applicable to the present; but I do not see that in any of those cases the learned Judges drew the distinction, and the observation of one of the learned Judges, in one of those cases, is clearly referable to another part of the case, and I find that they all proceed upon general grounds.

Then, my Lords, we come to the case of Robertson *v.* Brown, which is admitted upon all hands to be directly in point. We

have then a series of authorities, not commencing, I admit, at a very early period, but uniform from the time they have commenced; not a divided opinion among the Judges, some thinking one course of proceeding to be the law of Scotland, and some thinking another course to be the law, but all concurring in opinion that it is not necessary to make the costs of the proceeding the subject of particular contract between the parties.

Then upon the other side, we have nothing to which we are entitled to look. The opinions of individuals, the authors or compilers of those books which have been referred to, are undoubtedly of some degree of authority. The fact of their being in the Juridical Styles, the statement of a course of proceeding more or less usually adopted, is no doubt not only matter of some importance, but it is also matter which may very properly be looked at to ascertain what is the course of practice; but it does not at all weigh against the authority of the decision of the Court of Session, and it is contrary to the law of Scotland and the practice of Scotland. Then has the appellant succeeded in making out his case, that the arbitrator in this instance exceeded his authority, and that the Court of Session were wrong in not setting aside this award? I consider the reverse of that to be most clearly and distinctly established. I think, therefore, that the interlocutor of the Court of Session is right, and ought to be affirmed.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as complained of, be affirmed with costs.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Agents.

[Heard 24*th April*, 1845.]

WILLIAM CLELAND, suing *in forma pauperis*, *Appellant.*

JANE PATERSON and others, *Respondents.*

*Process.—Jury Trial.—Jurisdiction.* An order for the trial of a cause not at the regular Circuits under the proviso in the 11th section of 1 William IV. c. 69, does not require to be in writing.

IN this case an issue, which was adjusted and sent for trial by Jury, was tried before a Judge, who was one of the Circuit Judges, on the 21st of May, four days before the circuit commenced. The appellant appeared at the trial without taking any objection. After verdict against him, he moved the Court in arrest of judgment in respect that there had not been any trial, because the circuit did not begin until the 25th of May, and no direction *in writing* had been given to hold the trial before the circuit, and therefore the Judge, (*Lord Cockburn*,) who tried the case, had no jurisdiction.

The objection arose under the 11th section of the 1 William IV. cap. 69, which is in these terms:—"And be it enacted, "that all causes or issues appointed to be tried before any Circuit "Court, shall and may be so tried before any one or more of the "Judges of the Court of Justiciary when upon circuit; and at all "trials before any Circuit Court the jury shall be taken from the "lists prepared for the trial of criminal offences: Provided al- "ways that it shall be competent to either division of the Court "of Session, if in their judgment it shall be considered necessary, "to direct any causes or issues to be tried by any other Judge or "Judges of the Court of Session, at any circuit town, and, if "necessary for the trial of the same, to cause jurymen to be "summoned in the manner provided by the before-recited acts."

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The Court refused the motion in arrest, and applied the verdict by a final decree in the action. The appeal was against this interlocutor.

*Mr. Turner* and *Mr. Anderson* for the Appellant, argued that the Court being one of Record, it could only speak by Record; if therefore the direction allowed by the statute were given, it could be shewn only by the written act of the Court; without such a written order it would be impossible for the party to know whether the requirements of the statute had been complied with, which he is entitled to know, as the jurisdiction does not arise under the common law, but is derived entirely from the statute. The presumption, indeed, was, that no order had been given, except perhaps some verbal communication from the President out of Court, because the Court had risen for the holidays, before the notice of trial for the ensuing circuit had been served.

*Mr. Stuart* and *Mr. Grant* for the Respondent, were not called on.

LORD BROUGHAM.—My Lords, it is quite evident that there is no ground for this objection being taken in this the last resort. The objection is entirely confined to one point, ought or not, in order to give jurisdiction to a judge, other than the Circuit Judge, the direction of the division of the Court to be in writing? That is the whole question. The Judges appear from this Report, (and it is not denied that this is an act of the Court,) to have examined into the fact, to have enquired whether there was a direction, and to have been satisfied that there was a direction through the President by the Division, because it could not have been a direction to the President through himself. It imports distinctly, therefore, that there was a direction given by the Division through the President to Lord Cockburn and the Jury Clerk. Now, the Act of Parliament does not say that the

direction shall be given to the Judge, it only says that it shall be given to proceed in the trial in that manner, other than by a Circuit Judge. There must have been some practice existing on the subject. This is referred to as having been the uniform practice for the six or seven years which had elapsed after the passing of the Act, and the Court did not feel themselves justified in disregarding that practice and setting up a new rule which has no warrant by the terms of the Act, namely, the rule that this direction of the Court must peremptorily be in writing. The Court did not find that it had been the practice ever to give such a direction in writing at all, and therefore they held that this was sufficient.

I do not mean to say, that if this had been well founded, the mere appearing of the party to it, would have given a jurisdiction which did not exist before. Upon that I am not called upon to say a word, but it does not appear that there was that defect of jurisdiction which is the whole foundation of the appellant's case. The interlocutors must, therefore, be affirmed.

LORD COTTENHAM.—My Lords, I am of the same opinion.

LORD CAMPBELL.—My Lords, in this case, if Lord Cockburn could not have had jurisdiction, the appearance before him would not have given him jurisdiction, and the party by appearing would not be prevented from objecting that he had no jurisdiction. But as Lord Cockburn, a certain form being observed, might have had jurisdiction, the party having appeared, and having taken the chance of a verdict, I am strongly inclined to think that it is not competent to that party now to object that that form has not been observed.

But, my Lords, it is not necessary that we should give any precise opinion upon that point in this case, because I have no doubt, if we were to enquire, it would be found that in this case, there was a parol direction given through the President for the

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cause to be tried. It is quite sufficient, therefore, for us to come to the conclusion, that in point of fact, there was that order, and then the only question to be raised, is, whether that order must be in writing. It appears to me, that there is no pretence for saying that it must be in writing, but that the order may be given by word of mouth, in the manner in which we believe it was given in this case.

I entirely concur, therefore, in the opinions which have been expressed, that there is no foundation for this appeal, and that the interlocutors must be affirmed.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed.

J. ANTON and G. and T. WEBSTERS,—Agents.

[Heard 24*th April*, 1845.]

PATRICK CRUIKSHANK and another, Trustees of James Cruikshank, Deceased, *Appellants.*

LADY ANNE L. CRUIKSHANK, *Respondent.*

*Obligation.—Provisions to Heirs, &c.*—An obligation by a father in the marriage contract of his son to pay the son's widow an annuity *held* not to be satisfied by an annuity provided by the son to his widow, out of the rents of lands to which he had succeeded as heir, under an entail executed by his father previous to the date of the contract of marriage, which contained a power of alteration or revocation.

*Ibid et Ibid.*—Held that an annuity provided by a son out of the rents of lands, purchased with the accumulations of the general estate of his father after payment of debts, and entailed pursuant to a direction by the father to that effect, could not be imputed in satisfaction *pro tanto* of a joint obligation by the father and son, in the son's contract of marriage, to provide the son's widow in an annuity.

*Trustee.—Executors.*—Trustees or executors purchasing and entailing lands with the residue of a testator's estate pursuant to a direction in that behalf *held* personally liable for payment of a bond of annuity granted by the truster.

ON the 2nd August, 1819, James Cruikshank executed an entail of his lands of Langley Park in favour of himself and his wife in life-rent, and their eldest son James in fee, and a series of substitutes. The deed contained an exception from the prohibitions of entail in favour of the institute and substitutes in these terms:

"But, with this exception, that it shall be lawful to and in "the power of the said James Cruikshank my son, and the "whole heirs of tailzie succeeding to the said lands, mills, teinds, "and others, and to each of them, to provide their wives and the "wives of the apparent and presumptive heirs in a life rent loca- "lity of any part of the said lands, teinds, and others above "written, not exceeding a fourth part of the free rent of the said "lands at the time such locality is granted, after deducting former

" life-rents and interests of provisions granted by former heirs to " children, if any be, so that subsequent life-rents shall not exceed " one-fourth part of the surplus rents, but may increase proportion- " ally as the former life rents and provisions shall cease and be paid " off."—The entail also reserved to the maker this power of alteration: " but reserving always full power and liberty to me, by any " deed to be executed by me at any time in my *liege poustie* to " alter, innovate, or revoke these presents, in whole or in part, to " change the order of succession of heirs, in whole or in part, to " discharge the several burdens, conditions, limitations, irritant " and resolutive clauses herein contained, or any part thereof, or " to add such other conditions and provisions to the same as I " shall think fit, to sell, alienate, or dispone, gratuitously or " otherwise, and to charge and affect with debts the whole lands " and others before disponed, or any part thereof, in such manner, " and as freely in all respects, as if these presents had never been " made or granted; but declaring that any alteration or revoca- " tion of these presents shall not be inferred by implication or " construction, but only from an express writing under my " hand."

On the 4th of August, 1819, the entailer executed a trust, disposition, and settlement of his whole lands and estate, real and personal, other than the lands entailed, upon the following among other trusts.

" *Secondly*, in trust for the payment and satisfaction of all my " just and lawful debts, death-bed and funeral expenses, and obli- " gations of every denomination or description, which may be " due and prestable by me at the time of my decease, in any " manner of way, together with the legacies and provisions here- " inafter mentioned, or which I shall make, leave, or bequeath " by any other deed, writing, or codicil. *Sixthly*, in farther " trust, that so soon as my said trustees shall have paid off or " extinguished my whole debts, funeral expenses, and legacies, " and such other bequests and legacies as I may afterwards think

"it proper to leave and bequeath to any person or persons, by "any writing under my hand, and after my said trustees shall "also have paid, secured, or set apart the foresaid provision of "6000*l.* sterling, to each of my daughters, or such part thereof "as shall not have been paid to them by myself during my life, "my said trustees are hereby directed and appointed, to pay, "apply, lay out, and secure such part of the yearly produce, "profits, and proceeds of my said whole estate, heritable and "moveable, real and personal, hereby conveyed to them, as shall "not be necessary or required for payment of the foresaid annuity "to my son James Cruikshank, with the principal and interest "of such monies as may have been borrowed by my said trustees, "and the whole charges, and expenses, and allowances before "mentioned, in manner following, viz.: to pay and apply one-"half of the said free produce and proceeds yearly to and for the "use of the said Patrick Cruikshank, my second son, or to his "heirs, executors, or successors, and that in lieu and place of the "annuity of 500*l.* before provided to him, which shall from "thenceforth cease and determine, and to lay out in trust, or the "public funds, or on such other securities as to them shall "appear good and sufficient, the other half of the said free surplus "and proceeds, and to accumulate the same from year to year, "until the said accumulated sum shall amount and increase to "the sum of 30,000*l.* sterling, which sum of 30,000*l.*" (*restricted by codicil to* 10,000*l. sterling*) "my said trustees are hereby "directed to lay out in the purchase of lands, tenements, or "hereditaments, in Scotland, and to settle and secure the same "to the same series of heirs, and under the same conditions, pro-"visions, clauses irritant and resolutive, declarations, restrictions, "limitations, and faculties, as are contained in and provided by "the foresaid disposition and deed of entail, executed by me, of "my lands and estate in Forfarshire."

In the month of January, 1821, James, the institute under the entail, made proposals of marriage to the respondent, the

daughter of the Earl of Northesk, and in contemplation of the intended marriage a contract was executed, to which the fathers of the two spouses were respectively parties. By that deed the entailer and his son bound themselves, "jointly and severally, " and their heirs, executors, successors, and representatives what- " soever, to pay to the said Lady Anne Letitia Carnegie, future " spouse of the said James Cruikshank, junior, during all the " days of her lifetime, from and after his decease, in case she " shall survive him only, an annuity of 500*l.* sterling, free of all " deductions and burdens whatever, at two terms in the year, " Whitsunday, &c. And farther, the said James Cruikshank of " Langley Park hereby binds and obliges himself, and his fore- " saids, to pay to the said James Cruikshank, his son, an annuity " of 500*l.* sterling, free of all burdens and deductions whatever, " and that at four terms in the year, &c., during the joint lives " of the said James Cruikshank of Langley Park, and James " Cruikshank, his son; and the said James Cruikshank, junior, " hereby obliges himself and his foresaids to educate and main- " tain the child or children of the marriage hereby contracted, " suitably to their rank and station, until they are properly " provided."

On the other hand, the Earl of Northesk gave the following obligation:

" For which causes, and upon the other part, the said Wil- " liam, Earl of Northesk, has, of the date of his subscription " hereto, executed a disposition and assignation of a bond by the " Right Honourable John, Earl of Hopetoun, to him the said " William, Earl of Northesk, and his heirs and assignees, for " 2000*l.* sterling, dated the 3rd day of February, 1809, with " interest thereof from the 14th day of November, 1820, in fa- " vour," &c., "in trust, for the uses and purposes, with the powers, " and under the conditions and provisions therein mentioned, " and that in name of portion or provision agreed to be paid by " him, the said William, Earl of Northesk, with the said Lady

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"Anne Letitia Carnegie, his daughter; of which trust-disposi-
"tion, and assignation, and bond for 2000*l.* thereby conveyed
"and made over to the said trustees, the said Lady Anne Letitia
"Carnegie, with consent of the said James Cruikshank, her
"future husband, and he for himself, and as taking burden upon
"him for her, and they both, with one consent, accept in full
"satisfaction to them of all legitim, executry, former provision,
"or whatever else she the said Lady Anne Letitia Carnegie can
"ask, claim, or demand, by and through the decease of the said
"William, Earl of Northesk, her father, or by virtue of the con-
"tract of marriage between him and the Right Honourable
"Mary, Countess of Northesk, her mother, or by any bond of
"provision granted by him to his said daughter, or by his latter
"will and testament, or by any other manner of way whatsoever."

In January, 1830, James Cruikshank, the maker of the entail, died, having been predeceased by his wife; and upon his death, James, the institute under the entail, entered into possession of the entailed lands under the entail, and in the month of March, 1830, he put the entail upon record.

While so in possession, Cruikshank, on the 29th of May, 1830, executed a bond of provision, whereby on the recital that by the 5th Geo. IV., c. 87, "power is granted to every heir of entail in
"possession of an entailed estate, under any entail then made, or
"thereafter to be made in that part of Great Britain called Scot-
"land, to grant provisions to their wives and children in manner
"therein fully set forth; and now seeing that I am desirous to
"exercise the said powers in manner hereinafter written," he bound himself to infeft the respondent in a life-rent provision out of his entailed lands of 600*l.* a-year, free of all burdens or deductions whatever; "declaring, as I hereby expressly declare, that the an-
"nuity to be payable to the said Lady Anne Letitia Cruikshank,
"from and out of the said entailed lands and estate, in virtue of these
"presents, is not granted by me, nor to be received by the said
"Lady Anne Letitia Carnegie, now Cruikshank, nor to be in

" any way interpreted or held as coming in lieu of, or as provided
" to her in satisfaction of the annuity of 500*l.* sterling per annum,
" which, in the contract of marriage betwixt the said Lady Anne
" Letitia Carnegie, now Cruikshank, and me, I and the said
" deceased James Cruikshank of Langley Park, my father
" bound and obliged us, jointly and severally, and our heirs
" executors, successors, and representatives whatsoever, to pay to
" her during all the days of her lifetime from and after my
" decease, in case she shall survive me; but that the whole
" rights and claims of the said Lady Anne Letitia Carnegie, now
" Cruikshank, under her said marriage contract, are reserved
" and shall remain entire to her, as if these presents had never
" been granted, my intention being, that she shall draw and
" enjoy the utmost provision I have it in my power to settle and
" secure for her out of the said lands and estate, in addition to
" and above, and over the provisions settled on her by my father
" and myself in the said marriage contract." The respondent
was duly infeft upon this bond, and her infeftment duly recorded.

Thereafter the lands of Tayock, part of the entailed estate, were sold under the powers of the 3 & 4 Will. IV., cap. 30, and 11,000*l.* was borrowed on the security of the other lands. To disencumber the title, the respondent renounced her infeftment over the lands sold and those made subject to security for the loan.

Afterwards, the trustees under the entailer's trust disposition and settlement, out of the accumulations of his general estate and in exercise of the power in that behalf contained in the deed, repurchased the lands of Tayock, and by deed in January 1836, settled them under the fetters of the entail of 2nd August 1819; and under the precept in this deed, Cruikshank was reinfeft in these lands, and his infeftment duly recorded in February, 1836.

In March, 1836, Cruikshank executed another bond of provision, on a recital of the powers given to heirs of entail by the 5th Geo. IV., cap. 87, and his desire to exercise them, whereby

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He bound himself to infeft the respondent in an annuity of 133*l.* 6*s.* 8*d.* out of the lands of Tayock, with a similar declaration as in the bond of 29th May, 1830. The respondent was infeft under the precept in this bond.

On the 4th May, 1842, Cruikshank died in insolvent circumstances.

In July, 1842, the respondent brought an action against the appellants, the trustees of the entailer, to have them ordained to pay to her 250*l.*, the half year's annuity, payable to her under her marriage contract at Whitsunday, 1842, and to secure to her the future due and regular payment of the annuity.

The appellants stated in defence, that after satisfying the primary purposes of their trust, the only fund remaining was a West Indian estate, which had become so depreciated in value, that it was doubtful whether there would in fact be any trust estate out of which to satisfy the respondent's demands, and they pleaded:

"I. The pursuer not being entitled to two jointures, and having that provided to her by the marriage contract, secured or nearly so by the charge on the entailed estate, the provision in the marriage contract has to that extent been satisfied, and the debt discharged.

"II. No act or deed, and far less any mere declaration on the part of Mr. Cruikshank, junior, whilst substantially satisfying the provision in the marriage contract, could avail to keep up the debt against his father and his father's separate estate.

"III. At all events, the separate estate of Mr. Cruikshank, senior, is clearly liberated to the extent of one-half of the debt, which was in any view the debt of James Cruikshank, junior, himself.

"IV. The defenders, as trustees, are in any view only liable to the extent of the trust estate under their charge."

The record was made up on the summons and defences, and

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thereafter on 24th January, 1843, the Lord Ordinary (*Woo*
pronounced the following interlocutor, adding the subjoined not

" The Lord Ordinary having considered the closed reco
" and whole process, and heard parties procurators, and ma
" avizandum, repels the defences and decerns in terms of t
" libel, finds the pursuer entitled to expences, and remits t
" account thereof when lodged to the auditor to tax and report

" NOTE. The obligation undertaken by James Cruikshan
" senior, and the late James Cruikshank, junior, in the marria
" contract executed in 1821, upon the marriage of the lat
" with the pursuer to pay an annuity of 500*l.* to the purs
" for life, in case of her surviving her then intended husba
" is expressed in absolute terms. There is no provision
" its terminating in any event, except that of her decease, n
" is there any other event, even pointed at or indicated,
" the occurrence of which it was to be extinguished. Farth
" it does not appear that the entail and trust deed, and sett
" ment, which James Cruikshank, senior, had previously ex
" cuted in 1819, if referred to, warrant any different constru
" tion being put on the obligation in the marriage contra
" than that which it must independently have received. Wh
" ther the contract be taken by itself or in connection with the
" deeds, it is thought that nothing will be found which adm
" of the obligation in question being construed so far as regar
" James Cruikshank, senior, and his estate, other than t
" entailed estate, to be an obligation which was to be exti
" guished wholly or partially upon James Cruikshank, juni
" either to its full amount or a part of its amount, making pr
" vision for the pursuer out of the entailed estate, if he shou
" succeed to it; or that if it was thereafter to continue to subs
" to any extent, it was only to the effect of enabling the purs
" to draw one annuity of 500*l.*, and no more. But if so, th
" there seems to be no ground for holding that by James Crui
" shank, junior, as subsequently heir of entail, granting in t

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"pursuer's favour the bonds of provision which he did execute "in virtue of the power given by Lord Aberdeen's Act, any "claim for the annuity in the contract of marriage as a separate "and independent provision ceased, and she has now only a "claim for one provision of 500*l.* a-year. The declaration in "the bonds quoted at page 6 of the summons excludes all ques- "tion as to the intention of James Cruikshank, junior, in exe- "cuting these bonds. No room is left for any presumption that "might arise from his being then a debtor in the obligation in "the contract of marriage. It is in express terms set forth that "the bonds were granted in addition to the marriage contract "provision, and not in lieu of or as a substitute for it either in "whole or in part. It has been said that James Cruikshank, "junior, had no power to grant the bond as additional provisions "to the pursuer, and that the declaration referred to must there- "fore go for nothing. But unless the obligation in the marriage "contract could receive the construction which the Lord Ordi- "nary has held to be inadmissible, he can discover no ground "on which the above plea can be maintained. Again, it has "been said that the trustees of James Cruikshank, senior, might "upon the footing of his being truly only a cautioner for his son "in the obligation in the marriage contract have taken steps to "compel the latter to substitute the provision which he had "power to make out of the entailed estate in favour of the pursuer "for that contained in the contract of marriage, and thereby to "extinguish it. But granting that the trustees could have done "so, it is a sufficient answer that no steps of the kind were "taken by them. On the contrary, James Cruikshank, junior, "was allowed to execute the bonds in the terms in which they "are conceived, by which the pursuer is made creditor in the "provision out of the entailed estate, in addition to and not as a "substitute, either in whole or in part, for her original provision "in her contract of marriage, which therefore remained in full "force, according to its terms. Such being the state of matters,

" the Lord Ordinary is of opinion that none of the defen
" insisted in are well founded."

On the 24th February, 1843, the Court adhered to this int
locutor.

*Mr. Russell* and *Mr. Rolt* for the appellants.—The obligati
of the father and son to pay the annuity sued for was joint a
several. When the father became a party to the contract
marriage, he was aware of the power he had given his son
provide his wife out of the entailed land. It cannot be presun
he contemplated a double provision for her, and therefore, wh
he entered into the contract, without exercising the power
alteration reserved by him in the entail, he must have conte
plated that a provision by the son in exercise of the powers in t
entail, would satisfy the obligation in the contract. In anotl
view, the entailed lands were the estate of the father at the d
of the contract over which he had an absolute right, as he cou
at any time have exercised the power of revocation, and the
fore the bond of provision satisfied his obligation out of l
estate, *pro tanto*, and set him free. The father, by allowing t
land to go to the son, satisfied every obligation upon him, and
was then the duty of the son to provide the 500*l.*

Though, as against the respondent, the father and son we
jointly and severally bound, as between themselves, they h
undoubtedly rights,—there was no antecedent obligation upon t
father to provide for the wife,—the marriage was no consid
ation to him, but it was to the son,—the father therefore w
in the nature of a surety for the son. Assuming him to be so, a
that the lands were not his but the son's, he was discharged
what had taken place with the son, the principal debtor, w
had satisfied the obligation out of his own assets, and in this vi
it was not in the power of the son by his declaration, to alter t
effect of his own act—a pure donation by a principal debtor w
discharge his surety.

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But whatever view may be taken of the bond for 600*l.* it is impossible that the respondent can be entitled to the annuity of 133*l.* 6*s.* 8*d.*, as the lands out of which it is payable, were purchased out of the general assets of the father—that purchase was made by the appellants on the assumption that all the liabilities of the father had been satisfied—she cannot therefore claim her marriage provision as an unsatisfied liability by him, and at the same time claim this annuity out of lands which it would not have been in the power of her husband to charge with it, but for the supposition that the liability had been satisfied. As regards this annuity, it must be viewed as satisfaction, *pro tanto*, whether the father were a co-obligor or a surety. The respondent is an appointee under a power in the father's gift by virtue of the statute. She takes, in fact, therefore, under the father's will.

The argument is strengthened by a consideration of the purposes of the several deeds. In Garshore *v.* Chalie, 10 Ves. 1, the Court looked at the intention of the provision, and the party taking by provision of law something similar to the provision by covenant, the one was held to be satisfaction, *pro tanto*, of the other. Here the intention was to provide for the wife of the son, and the son, accomplished it, out of what fund matters not to the respondent. In Wilson *v.* Piggott, 2 Ves. 351, it was said, "The Covenantor having suffered property to go so as to produce "the same effect, that is held a satisfaction of the covenant as in "Lechmere *v.* Carlisle, 3 P. Wms. 211, when lands suffered to "descend, were held a satisfaction of a covenant to purchase." Here the father suffered property to go, so as to produce the effect of satisfaction.

The two bonds were identical in intention with what the father had covenanted.

The summons concludes against the respondent, as personally liable to pay without regard to whether they may have assets of their truster or not; but they cannot in any view be liable beyond the fund in their hands, and no account has yet been

taken so as to ascertain whether they are in funds to answer these annuities.

*Mr. Stuart* and *Mr. Monteath* appeared for the respondent, but were not called upon.

LORD COTTENHAM.—My Lords, this case appears to me to be very free from doubt, as the Court of Session seem to have thought it. The object of the suit is to obtain payment of an annuity of 500*l.* a year, which, by the marriage contract, the father and son jointly bound themselves to pay to the intended wife of the son. The husband being dead, and the father being dead, she is now suing those who represent the father, for the payment of this annual sum of 500*l.*

The defence is, that the son, after the father's death, being in possession of the entailed estates, executed two bonds, by the first of which he charged the entailed estate under the power he had under Lord Aberdeen's Act, with the payment of 600*l.* a-year to his wife, in terms stating that that was to be without prejudice to the 500*l.* a-year. Therefore, as far as intention was concerned, excluding any argument on that ground. The other was a bond for the payment of 133*l.*, charged upon estates which had been purchased with the accumulation of interest from a portion of the residue of the father's estate, and in a similar way he charged the annuity on that portion of the estate. Therefore, as far as intention goes, there is no question on which an argument can be raised. The son intended this provision for his wife, in addition to the 500*l.* a-year provided for her by his marriage settlement. He has in terms so expressed himself by these several grants.

Then it is said, first of all, this cannot be in satisfaction. That is matter of intention. There is no evidence that it is in satisfaction; on the contrary, the evidence is all the other way. It is not intended in satisfaction by the granter, the husband, or the wife who accepted it.

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Then the argument is put in this way—that the father and the son having joined in this marriage contract to pay the 500*l.* a-year, the father is to be considered as a surety only for the son, and that the principal debtor, namely, the son, has in fact done all that by the joint obligation the parties contracted to do. So that the contract and stipulation is performed.

Now, that rests entirely upon the supposition of the father and son being principal and surety, that is to say, that the father who joins in the contract or obligation upon his son's marriage, can say to his son, or to the wife, or to the wife's friends, who have entered into a corresponding contract, that he is not to bear any part of the burthen himself, but that if he is compelled by law to make any payment under such contract, he can recover it against his son, which is a general consequence of these parties standing in the relative situation of principal and surety. That to be sure would be a great surprise upon the wife and the friends of the wife, who, considering that they have got a beneficial pecuniary contract from the father, find that it turns out, that the family for whom they meant to provide are to receive it, but are in fact to repay it when they have received it, so that, in fact, the provision for the married couple would turn out to be of no benefit to them.

That clearly being so, and it being clear that the consideration runs through the whole, and that the parties are not principal and surety, all the rest of the argument entirely fails. Because, if they are not principal and surety, but both are liable as principals, then, unless it is to be contended that parties under a joint obligation cannot, by any possibility, confer a benefit on the obligee, the son has in terms said, "I mean to confer an "additional benefit on the obligee." He has availed himself of his right; it is clear that he had that right, and intended to exercise it.

Therefore, as far as the 600*l.* annuity is concerned, there is no argument whatever on which an objection can be founded.

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Then with regard to the 133*l.*, how does that stand? It is said, the wife has received so much of the 500*l.* a-year out of the father's estate. It was impossible to maintain that argument without supposing that she received that benefit from the father's estate. But she has not received it out of that at all. The 10,000*l.* was a legacy to another party totally distinct from her. She had no connexion with that 10,000*l.* It was a benefit to the son and those who might take under the entail. But those who took under the entail having received that bounty from the testator, the husband's father, beyond all doubt, had a right to do with it as they pleased. Had they no right, deriving their title under the father's will, to charge that property so derived with an additional annual payment to the son's wife? It originally constituted part of the father's estate; but her title to it is not under the father's will, nor is her title to it under his estate, but it is given, and flows entirely from the bounty of her husband.

Then it is said that the decree is defective because it makes a personal charge against these trustees, and makes them pay. They are only undoubtedly in law liable to pay so far as they have assets. But parties may so conduct themselves that they cannot dispute the possession of assets. If an executor thinks proper to pay legacies, and to pay over a part of the property as the residue of the estate after payment of the legacies, is he to tell a creditor that he will not pay the debt, or that he cannot, because he has not got in hand assets of the testator? Whether he has kept those assets in his hands, or thought proper to pay them away from these persons, who could only claim them after payment of the debts, is precisely the same thing to the creditor. What are the provisions of this will? The provisions of this will are, "In trust after satisfaction and "payment of all my just and lawful debts, death-bed and funeral "expenses, and obligations of every denomination or descrip-"tion." Then they are to pay certain legacies,—6000*l.* a piece

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to each of the daughters, and a provision for the younger sons. Then they are to accumulate a portion of the income of the residue until it comes, as he first stated, to 30,000*l.*, but by a codicil he altered it to 10,000*l.*, which 10,000*l.* is to be laid out in the purchase of estates, to be settled as the other estates which were entailed. That has been done.

Then are we to be told, (not that it is put forward as a fact,) that they had no assets. It is quite obvious that could not be presumed. They have, therefore, dealt with this property, assuming that they had ample to pay all obligations of whatever denomination, and this is one, and the executors, from the mode in which they have conducted themselves, have excluded themselves from the power of contesting the fact of having received assets. Whether they have them now is immaterial. Having had means with which this obligation could be performed, it was their duty to have paid it over before they applied any portion of the estate in payment of the legacies. Independently of the legal result of the course they have pursued, the amount is such as to satisfy every one who looks into the mode in which they have applied the property, that in point of fact it was amply sufficient for this purpose.

The sole question, therefore, being whether any legal defence has been stated and proved against this obligation to pay out of the father's estate, I am of opinion that no such defence has been established, and that the decision of the Court of Session is right.

LORD BROUGHAM.—My Lords, I agree with my noble and learned friend, that there is nothing in this case. I could have wished that it had not come here. I freely state that I do not think it ought to have been brought here. I do not understand why we, in this House, should have such cases brought here as we have had this morning twice over. This is the second time to-day that a case has been brought up, in which it does not

appear to me that there is a shadow of argument, not even, as Lord Thurlow once said, "a probable argument."

The argument very ably and clearly urged by Mr. Rolt, would have very much to say for it if the parties, (the situation of the parties here is that of father and son,) had stood in the relation of principal and surety. It is quite clear on every ground, that they do not stand in that relation. There is a consideration moving to both in the marriage contract; and whether there is a provision made for the son or not in that marriage contract, it is equally a consideration moving to both. And the best answer to the argument which is set up, is, Can anybody say that if the father had paid, he could have had recourse over against the son in respect of his payment? It is not to be endured. It is impossible it could be so.

Then, my Lords, with respect to the decree being against the trustees personally, there is an end of that. At first I was disposed to think that perhaps there had been a slip in the decree, and that we might have corrected it by the insertion of a few words. But it is no such thing. There is no occasion for that, for it does not lie in the mouth of the executors to say that they have no assets, when as volunteers they have chosen to pay legacies, and not only legacies, but legacies out of the residue, which assumes that all the other legacies have been paid in priority of the administration of the estate. My noble and learned friend has justly observed that that of itself deprives them of the possibility of denying assets. It is an admission of assets —whether they have assets or not, whether they have used them in any way or not,—it is an admission on their part which they cannot gainsay or get rid of here.

My noble and learned friend read the statement in which it is said that they are to pay the legacies out of the residue, after having paid so and so, and "after having paid all my obligations." I do not care whether that is in the will or not, because the law would have inserted that.

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Suppose a testator says, I give to A. B. a legacy of 10,000*l.*, without saying, "to be paid out of my residue," it is clear that his debts must be paid in the first instance; whether he says, "I give it to be paid after my lawful debts, and all obligations "which I owe," or not, the executor is bound not to pay the legacy until he has paid the honest creditor. Here it is in evidence, that there was money in hand.

Therefore, there is not really, as I said before, a probable ground, not even a *prima facie* argument, to call upon your Lordships to hear the respondent. Therefore, you cannot hesitate what judgment you are to give.

I conclude as I began, with making my complaint, that I think it is not right, that this House is not well used, in having its time occupied by cases such as we have had the whole of this day.

LORD CAMPBELL.—My Lords, the only foundation for the ingenious argument that we have heard at your Lordships' bar is, that the father was surety for the son. Now, my Lords, if they stood at all to each other in the relation of principal and surety, I should much rather say that the son was the surety for the father than the father for the son; I think it is quite clear that it was from the bounty of the father this payment was to issue, not from any provision that was to be made, so far as that was concerned, by the son.

But, my Lords, the foundation of that argument seems to me utterly fallacious, and there is no use in saying another word about it.

With regard to the objection as to the form of the decree, there is no doubt when one looks at the summons it does seem to charge the trustees personally, and the decree would make them personally liable. But, my Lords, they are personally liable, if they have assets in their hands out of which these payments might be made. And I think it is quite clear that

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they must be taken to have assets in their hands for that purpose, and therefore, that they are personally liable, and that the decree is good in form as well as in substance.

I therefore regret that the parties should not have been satisfied with the opinion of the Court below. It was thought below, there was an argument in the case that might be successful. But I should think if the learned gentlemen who have argued this case as well as it could be argued, had been consulted, they would hardly have certified to this House, that there was reasonable ground for appeal.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

PURRIER & WRIGHT—G. & T. W. WEBSTER,—Agents.

[Heard 14th Feb.—Judgment *25th April*, 1845.]

ADAM FORREST, one of the Macers of the Court of Session, *Appellant.*

JOHN HARVEY, Solicitor, Leith, *Respondent.*

*Jurisdiction.*—Held, that Magistrates of a burgh, acting as Justices under 6 Geo. IV., ch. 48, had no jurisdiction to entertain an application under the Statute, the warrant of citation having been signed not by the Justice of Peace Clerk, as required by the Statute, but by the Clerk to the Magistrates.

*Jurisdiction—Homologation.*—Held, that a defect in Jurisdiction, occasioned by the warrant of citation on an application under the Small Debt Act, 6 Geo. IV., c. 48, not having been signed by the proper officer, was not cured by the party cited having appeared and pleaded.

THE 2nd sect. of 6 Geo. IV., cap. 48, enacts, that it shall be lawful for two or more justices of the peace to hear and try causes for debts not exceeding 5*l.*, "in a summary way, as more "particularly hereafter mentioned." The 3rd sect. enacts, that "such causes "shall proceed upon complaint agreeable to the "form in schedule (A) subjoined,"—"and the Clerk of the "Peace, or any deputy by him appointed, shall adject to the "said complaint, and on the said paper a warrant signed by him "agreeable to the form in schedule (A)."

The Schedule gives a form of Petition to "His Majesty's "Justice of the Peace for the Shire of," &c., and of a warrant by "the Clerk of the Peace for the Shire of," &c. for compearance "before the Justices of the Peace for the said Shire."

The 14th sect., which will be found *infra*, p. 217, declares, that the decree of the Justices "in any case competent to them," shall not be subject to advocation or suspension except on consignation, nor to reduction unless for malice or oppression.

The appellant presented an application against the respondent, under the Statute addressed to "The Magistrates of Leith,

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"Justices of Peace for the Town of Leith and Liberties," and obtained a warrant for citation, which set out with these words, "The Clerk of the Court grants warrant," &c., and was signed "Alexr. Hay, Dep. Clerk." Alexander Hay was the depute town clerk of Leith, under Anderson, the principal town clerk, who was appointed by the magistrates and council, but was in use to sign the documents issued by the magistrates who were of the commission of the peace for the city of Edinburgh and liberties, when sitting as justices. The respondent declined the jurisdiction, upon the ground that the magistrates had none in a summary form *qua* magistrates, and that they had no power to hold a court as justices of the peace. The magistrates disregarded the declinature and decerned for payment, and ordained instant execution by arrestment and poinding, as in cases of small debts. The respondent complained, (by suspension and also by reduction,) to the Court of Session, and pleaded the following pleas in law, embracing a repetition of his objection before the magistrates:

"1. The magistrates had, on the grounds stated, no compe-
"tency or jurisdiction to determine the matter of the action
"brought before them, especially by summary forms of proce-
"dure, and in the form and manner herein set forth.

"2. In particular, the magistrates were not entitled to dis-
"regard the statutory form prescribed by the Act of 6 Geo. IV.,
"cap. 120, and Act of Sederunt, 12th November, 1825, in
"actions brought before them as Bailies of Leith, and they were
"not entitled to hold courts in the *pretended* capacity of being
"justices of the peace; and under the Statute 6 Geo. IV., c. 48,
"passed in regard to the counties and stewartries, the provisions
"of which Statute were not intended, and are not conceived in
"terms, to apply to them, the said magistrates were not entitled
"to do so under any other Statute, or by the common law, and
"they were not entitled, of their own will and determination, to
"create and assume a jurisdiction depriving the community of
"the protection of recognised forms of legal procedure.

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"3. Supposing the magistrates *had* been entitled to hold "courts as justices of the peace under the Statute 6 Geo. IV., "c. 48, they did not conform themselves to the requirements "therein enacted, and are not within the jurisdiction and pro- "tective clauses therein embodied, in respect, among other "grounds set forth, (1.) That the complaint was not addressed "to the bailies as justices of the peace of any *county* or *shire*, "as required by section 3d and Schedule A of the Act. (2.) "That the complainer was cited to appear *before the magistrates* "*of Leith* and *not* before the justices of any county or shire, as "is required by the said Section and Schedule. (3.) That the "person who signs the warrant of citation was not the clerk of "the peace of the county of Edinburgh, or a *deputy* by him "appointed, as is *required* by the said section, or a clerk ap- "pointed by *section* 21. (4.) That the copy citation did not "bear that the complaint and warrant had been served upon "the complainer; and (*lastly*), That the judgment pronounced "does not bear to be by one of the justices of the peace of any "*shire* or *county*, as is required by the said section 3 and "schedule."

The appellant pleaded the following among other pleas:

"1. The present suspension is barred by the complainer's "joining issue with the respondent on the merits of the claim "before the magistrates *qua* justices, without objecting *in limine* "to the jurisdiction, or to the regularity of the citation and "execution thereof.

"2. The magistrates of Leith having been admittedly in the "actual and uninterrupted exercise of the powers and juris- "diction of justices of the peace under the Small Debt Acts "for a long period of years, and it not being disputed that the "case decided by them was a case which fell under the juris- "diction of the justices of the complainer's *forum*, the present sus- "pension, on the alleged ground that the magistrates are not "validly invested with the character of justices, is incompetent,

" especially as no reduction has been brought of the commisions, " or other warrants or authority under which the magistrates " have so acted and are acting.

" 3. At all events, as the magistrates of Leith were legally " invested with the jurisdiction of justices of the peace as exer- " cised by them, the present suspension is incompetent under " the Statute 6th Geo. IV., cap. 48, section 14.

" 4. Any alleged irregularity in the appointment of the " clerk to the magistrates *qua* justices, would not render the " present suspension competent, nor void the procedure before " the magistrates. Neither could that ground of challenge be " entertained, except in a proper action directed against the clerk " and his constituents, or at all events in an action to which " they were made parties. There being, however, no irregularity " in the appointment of the clerk, this ground of suspension is, " in any view, inapplicable.

" 5. In like manner irregularities in the form of procedure " would not void the procedure, or render the present suspension " competent. At all events, no irregularity which could have " this effect is alleged to have existed, or did exist; on the " contrary, the action, claim, and decree, and whole relative " procedure, were in all respects just, legal, and regular, and " therefore the present suspension is in every view both incom- " petent and unfounded."

The Lord Ordinary (*Cockburn*) on 8th July, 1840, after hearing counsel, pronounced the following interlocutor, adding the subjoined note:

" The Lord Ordinary having heard parties, and considered " the process, sustains the respondent's plea that the suspension " is incompetent; dismisses it, and decerns: Finds the suspender " liable in expenses; appoints an account thereof to be given in, " and, when lodged, remits to the auditor to tax and to report.

" NOTE.—The suspender insists that the Justice Small Debt " Statute, and even its schedules, though these last be given as

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"mere examples of forms, shall receive the most literal and "judaical construction—a construction so rigid as to render "the Act worse than useless. For example, the Statute directs "the citation and the service of the complaint to be by a '*con-*" *stable or peace officer.*' It was done in the present instance "by an *officer*, but because the schedule happens to say 'A B. "'*constable*,' and the officer here was not a *constable*, it is main-"tained that this vitiates the whole proceedings. Some encou-"ragement has perhaps been given to this hypercriticism by one "or two judgments, but though the Statute no doubt must be "interpreted fairly and legally, quibbles which destroy the prac-"tical usefulness are entitled to no favour.

"The Lord Ordinary is of opinion that the magistrates had "jurisdiction to decide the cause as justices; that the objections "taken to the regularity of the proceedings are all groundless; "and that, with one exception, they are all frivolous.

"This exception, which forms the only difficulty in the case, "relates to the clerk.

"The Statute provides that the warrant to cite and the "judgment shall be signed by '*the clerk of the peace*, or any "'deputy by him appointed.' Considering that the object of "the Act is to give cheap and speedy justice to poor people, "in poor causes, it would not have been unreasonable to hold "that these suitors were entitled to rely that the clerk *de facto* "was the clerk *de jure*; and that if they found a person in the "office, and recognised by the public and the justices as entitled "to be so, they were safe in dealing with him, especially where "there was nobody else to whom they could resort as more truly "the clerk. But in the case of Cumming, 19th November, "1833, the Court found that a secret flaw in the appointment of "the acting clerk nullified the whole proceedings. This deci-"sion seems to have made the history of the clerk's appoint-"ment, with the view to discover a blot in it, a subject of "inquiry with all parties seeking for grounds for suspending

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" small debt decrees. There is another case of the kind before " the Lord Ordinary.

" The objection taken here is, that those who appointed the " clerk had no authority to do so: and the facts are that the " magistrates, as justices, had appointed Mr. Anderson, and that " Anderson had given a deputation to Mr. Hay, by whom the " papers in this case were signed. Now, it is said that the " '*clerk of the peace*' means the ordinary justice of peace clerk " for the county, or at least a clerk who can only be named by " the Crown.

" If this be correct—and if it be true that the magistrates, " acting as justices, cannot appoint their own clerk to officiate " within their own town—then the Lord Ordinary does not see " how his judgment on this point can be maintained. But it " appears to him that the magistrates can make such nomina- " tions, and he believes that they have been in the general and " inveterate practice of doing so. The case of Edinburgh is " disputed by the parties, but it does not seem to be disputed " that this has been the practice at Leith, since ever the magis- " trates there acted as justices.

" All that the suspender says about the case of Mabon, 15th " November, 1836, and about the constitution of the Burgh " Court at Leith, is inapplicable to anything that occurs here. " The magistrates of Leith are in the commission of the peace, " and they have not decided beyond 5*l.*, and therefore we have " nothing to do with their magisterial history or constitution, or " any alleged extension of jurisdiction."

The respondent reclaimed to the Court, who ordered minutes of debate, and upon advising these pronounced the following interlocutor.

" The Lords having resumed consideration of the reclaiming " note for the suspender, with the whole proceedings and minutes " of debate, alter the interlocutor complained of: find that the " proceedings in the Small Debt Court, held by the magistrates

"of Leith, as justices of the peace, must be regulated by and "in conformity to the provisions of the statute 6 Geo. IV., c. 48: "find that the warrant for summoning the reclaimer, John "Harvey, to appear in the action raised at the instance of the "respondent Adam Forrest, in the justice of the peace Small "Debt Court, held at Leith, and also the decree in said action "of which suspension is sought, were signed by Alexander Hay, "the depute town clerk of Leith, acting as under the character "of clerk to the said Justice of Peace Court, in respect of his "office as town clerk of Leith, or the depute of said town "clerk: find that the town clerk of Leith or his depute is not "entitled, under the above-mentioned statute, to act as clerk to "the said Justice of Peace Court, and cannot be taken to "be, in terms of the said statute, the clerk of the peace or "depute clerk of the peace: find, that the proceedings com-"plained of were therefore incompetent and invalid, and of no force "or effect in law; suspend the letters *simpliciter*, and decern."

The appeal was against this interlocutor.

*Mr. Turner* and *Mr. Anderson* for the Appellant.—It has been found by the Court below, and is not now disputed, that the Court of the magistrates was competent, as a Court of Justices, to try the question which was brought before them, and that the question was competently entertained, unless in so far as the warrant of citation was not signed by the proper officer. The Court below has treated the objection on this score as one to the jurisdiction, but it is truly to the regularity of the process, and in that view it was not competent to inquire by suspension into the regularity of the process, inasmuch as the statute 6 Geo. IV., cap. 48, declares in the 14th section, that the decrees of the Justices, "in any case competent to them," shall not be subject to advocation, suspension, appeal, or other stay of execution. Brodie *v.* Smith, 14 *S.* & *D.*, 983; McEwan *v.* Harrison, 16 *S.* & *D.* 923; Rankine *v.* Lang, 6 *B.* & *M.* 183.

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But assuming the suspension to be competent, the magistrat of Edinburgh, like all magistrates of Royal Burghs, are *ex offic* justices of the peace. And the magistrates of Leith have b 39 Geo. III., cap. 44, all the powers which the magistrates Edinburgh have. If the magistrates of Leith, then, were ju tices of the peace within the meaning of the statute, their cler must be clerk of the peace *quoad hoc*. Though the power t nominate the clerk of the peace was by the Act 1686, cap. 3 declared to belong to the Secretary of State that, both by th terms of the statute and the usage following upon it, applie only to justices holding by commission and not to magistrat of burghs being as such justices, and having power as magi trates to appoint their own clerk. Anderson had been appointe by the magistrates to be the town clerk, with power to appoi a deputy, and he had always been in use, as his predecesso before him had been, to act as the clerk of the magistrates, whe sitting as a Court of Justices; if, therefore, he was not *de ju* justice of peace clerk, he was so *de facto*, and the lieges wer entitled to rely upon all documents signed by him, in that ch racter, or by Hay, who was his deputy, as being signed by th proper officer. Learmonth *v.* Gordon, *Mor.* 3096; *Stair* IV. 4 s. 2; *Ersk.* I. 4, 33, and IV. 2, 6. The mere general appoin ment of town clerk has been recognised as giving the offic of clerk to the magistrates in the other jurisdictions whic they exercise, Dowie *v.* Douglas, 1 *Sh.* App. 125; Carse Kelly, 1 *Sh.* 178.

It is no doubt true, that the form of warrant in the sche dule to the Act 6 Geo. IV., is so expressed as to be by the cler of the peace "for the shire," &c., but if that is sufficient to she that the warrant must in every case be issued by the clerk of th peace for the county, the subsequent part of the form which for a compearance "before the justices of peace for the shire &c., will go to show that the magistrates, as such, had no juri diction, which nevertheless it has been found they had, as w

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also found in regard to other statutes in Mackay, Skirving and Co., *v.* Bond, 17 *F.C.* 453.

The provisions of the statute, coupled with the schedule to which they bear reference, are merely directory as to the mode of proceeding. The duty imposed on the officer is purely ministerial. No trust or confidence is reposed in him, he is a mere conduit pipe through whom the party is to be brought into Court: the Judges and officers are informed by what means, and by whom the provisions of the Act are to be carried out, but no nullity of the proceedings is declared, if these particulars should not be complied with, and none can be inferred by the Court. In Harris *v.* Jayes, *Cro. Eliz.*, 699, a grant by copy made by one not Steward of right, but sitting in Court as such, was held to be good, "for the law favours acts of one in reputed authority." In Knight *v.* Corporation of Wells, *Lutw.*, 188, it was held that a bond by the Mayor of a Corporation not duly elected was good, because he was Mayor *de facto*, and his acts merely ministerial, were good. So in Margate Pier *v.* Hanham, 2 *Bar.* & *Ad.*, 266, an act by justices not duly qualified, was held good that the public might not suffer.

If the objection be to the process and not to the jurisdiction, there is no authority for holding that it nullifies the proceedings. In Cumming *v.* Munro, 12 *S. D.* & *B.*, 61, the proceeding was founded on a common-law writ, and if the writ was bad, no doubt the whole proceeding fell, but here the foundation of the proceeding was the petition and complaint, as to which no objection is raised. In Maben *v.* Walker, 15 *S.* & *D.*, 1087, there was an excess of jurisdiction. At all events, the party by appearing and pleading, waived the objection whether to the process or to the jurisdiction.

The *Lord Advocate* and *Mr. A. Mc Neill* appeared for the respondent. Their arguments appear sufficiently in what fell from the Peers who delivered judgment for affirmance.

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LORD BROUGHAM.—My Lords, in this case, which was hea about a fortnight or three weeks ago, there was a great controver in the Court below, which was continued here, and the case w argued certainly on either side with great ability and learnin and the importance of the question, (as a question of jurisdicti always is important,) required particular attention to be paid to i and your Lordships therefore took time to consider, with a vie to see your way through the difficulties with which the case w admitted, both in the Court below and here, to have been su rounded.

Now, the two objections which were taken on the part of t present respondents, one of which alone prevailed in the Cou below, are, First, that the Magistrates of Leith had not t jurisdiction conveyed by the statute as a Small Debt Court, a could not act as justices under the Act of the 6th George IV cap. 48, as a Small Debt Court. And, secondly, that althou they might have that jurisdiction, still the warrant was illegal issued by a party who was only town clerk, or rather the deput of Anderson the town clerk, and who was not the person desi nated by the statute, namely, the clerk of the peace or h deputy.

Upon the first of these grounds, it would in my opinion ha been vain to contend, as was attempted, that though the magistrat might not have jurisdiction, nevertheless that objection had in th case been cured by the party answering to the summons, enteri into the litigation before them, joining issue before them, as it wer and allowing the cause to proceed to its conclusion, taking t beneficial chance of a judgment in his favour, and not objec ing to the jurisdiction, but reserving that objection till t moment when it should be found that he had failed in his expe tation of obtaining the judgment, and a decree went forth again him. If the magistrates had no jurisdiction in the subject-matt that argument is of no avail. No parties can convey to a Cou jurisdiction which does not belong to it. If parties were ever

consenting to the Court of Chancery for example, in this country, exercising jurisdiction as a Court of Probate, granting probate of a will, that would not prorogate, as the civilians term it, the jurisdiction of the Court of Chancery. That consent on the part of the parties would not convert the Court of Chancery into a Court of Probate. So if the Court of Queen's Bench or Common Pleas were to assume jurisdiction to deal with questions of prize which do not belong to a Court of Common Law, which at one time there was great controversy about, but it was long since determined in the old case of Mitchell, &c. *v.* Rodney, 2 *Bro. P. C.* 423, (the Reporter believes) a very well known case, that they have no jurisdiction in such a case, in the event of the parties consenting ever so explicitly and ever so formally, even if they entered into a rule of Court upon the subject, it would not convert a Court of Common Law into a Court of Prize, and would not prorogate its jurisdiction. Therefore if the magistrates of Leith had not the jurisdiction, which was a creature of statute entirely created by that Act, the consent of the parties appearing there and not taking the objection, and taking the benefit of the chance of a judgment for them, and only objecting to the jurisdiction should the judgment go against them, would not be even a topic in argument to show, that the Court below had jurisdiction by the statute.

I dwell the more upon this view of the case, for I am of opinion, (and I believe upon that we are all agreed,) that the Court below was right in holding the first ground of objection to be invalid, and in considering that the magistrates had the jurisdiction; but I dwell the more upon this topic for the reason which will immediately appear under the second head to which I am now about to address myself. I agree that the magistrates here, (for reasons which it is unnecessary to trouble your Lordships with, because they can hardly be said to be any longer in dispute in this case,) had jurisdiction, that they were within the provisions of the statute, and that they, acting as justices, had

a small debt jurisdiction. I agree,—it is needless to state why, because it is most distinctly and lucidly stated in what my Lord Moncrieff calls in his most able judgment, (with the first branch of which I entirely concur,) a deduction,—I agree that the magistrates had jurisdiction.

So far, therefore, we are agreed as to the jurisdiction of the Court below, and the next question that arises, and the only question now really before your Lordships is this, whether that jurisdiction did exist in the manner in which it was explicated, I mean by the warrant, not issued by the clerk of the peace, or his deputy, but by the town clerk, or the clerk of the justices. Now, though agreeing with Lord Moncrieff that the case is not free from all difficulty, yet I am, on considering it very clearly, of opinion that the warrant was not duly issued, that it was not issued so as to give jurisdiction to the Court, because it was not issued by the clerk of the peace, or his deputy, who are the only persons authorized by the statute to issue that warrant; which warrant is the foundation of the whole proceeding, absolutely essential to the proceeding, from which the proceeding takes its rise and spring, which existing the jurisdiction exists, which failing the jurisdiction too fails, and consequently if I am right in my view of the statute, and of the warrant, and of the whole proceeding, we are brought round to that first and cardinal view of the subject, which for this reason therefore I have dwelt upon already, viz., that the jurisdiction which was exercised, depends upon the jurisdiction existing, and that although the magistrates might have had jurisdiction if it had been exercised according to the statutable provisions, that is wanting in this case, without which they had not that jurisdiction, namely, the origin and substratum of the whole proceeding, a warrant duly issued by the clerk of the peace.

Now, my Lords, in order to show this more fully, I shall refer your Lordships to the statute itself, (again remarking that the jurisdiction is a mere creature of statute,) " That all causes shall

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"proceed upon complaint agreeable to the form in schedule (A)," to which I shall presently also advert, "and the clerk of the "peace, or any deputy by him appointed, or, in case he shall fail "to appoint one, the clerk to be appointed within the district as "hereinafter provided," which is explicitly provided, "shall adject "to the same complaint, and on the same paper or warrant "signed by him agreeable to the form in schedule (A) subjoined "to the present Act." The schedules are part and parcel of the Act as if they had been positive enactments.

Now it is worth looking at the schedule in this instance to see what the nature of this warrant by the Act of Parliament is. It is really not in the nature of a common writ or common process, but it is actually a warrant for summoning the defender to appear; the clerk of the peace acts by issuing the warrant. The clerk of the peace for the shire grants a warrant to summon the defender to compeer before the justices of the peace. This warrant is at the root of the whole proceeding, and it must be issued by the clerk of the peace. Now no one can appoint a clerk of the peace in Scotland except the supreme authority of the State, that is provided by the Act of 1686, cap. 20; he must be appointed in a special manner by the Crown. There is no such appointment of the party acting in this case; he was not the deputy of the clerk of the peace any more than he was the clerk of the peace himself, consequently the warrant is wholly void.

Now I observe, that the only one of the learned judges who differs from the judgment below is my Lord Medwyn. He takes a view of the subject in which it is utterly impossible for me to concur. In order to get rid of the force of the statutary objection which I have just named, he says, that he would have adopted the same conclusion with Lord Moncrieff who had preceded him, had he not thought himself bound to go further back than the statute of the 6th of George IV., cap. 48, (which is the Act I have been referring to,) to the Act of the 39th and 40th George III., cap. 46. Therefore I, following his Lordship, go

back, (I do not feel myself bound to go back so far as h did, but still I volunteer to go back,) and that Act of Parliamen I find, says nothing about the clerk of the peace, it speaks c the justice of the peace clerk. The justice of the peace cler cannot mean the clerk of the peace. I think they cannot argu that; it means, of course, the clerk to the justices. But I ob serve, that the very first provision of the Act of 6th George IV cap. 48, (and that ought to have prevented Lord Medwyn fro going back to the former Act,) is to declare the former Act, t which he goes back, viz., the 39th and 40th George III., cap. 4 to be repealed. That Act is positively repealed with one excep tion, which does not apply here, viz., with the exception of case pending at the time, the hearing of which cases are to be pro ceeded with as if the repeal had not taken place. Therefore i is in vain to go back to that first Act. We are bound by th Act of the 6th George IV., cap. 48, and that is quite sufficien for disposing of the question.

I will not detain your Lordships further therefore, especiall as I concur entirely with the Court below, than to add, that fo the first reason I have given in dealing with the first objection (in which objection I do not concur, because I agree with a their Lordships in the Court below that the magistrates had th jurisdiction, but for the mal-appointment of the clerk who issue the warrant,) I go back to my observation as to whether consen is sufficient to cure the objection. If the objection is good for an thing it is an objection to the jurisdiction. It is an objection not to the form of the proceeding, but to the jurisdiction; now am far from saying that an objection may not be waived,—I a far from saying that an irregularity may not be got over,—I far from saying that the consent of parties may not stop them from taking exception to certain irregularities, but consent will not warrant an extension or prorogation of jurisdiction, althoug it will prevent the party from taking the benefit of an exception because it will operate as a waiver, and cure informalities a

irregularities of certain kinds. For instance, if it is admitted that the clerk of the peace, or the person *de facto* clerk of the peace, or the person acting as such under the appointment of the clerk of the peace, though perhaps a person not qualified to be clerk of the peace, and whose want of qualification might expose him to a penalty for acting, or whose want of qualification might have been a good ground for seeking his removal in a competent mode of proceeding, or whose want of qualification, if it had been stated in time to the party appointing him, might have prevented his appointment, and precluded his acting as clerk of the peace; if, I say, it is admitted that that want of qualification may be cured, that that irregularity in his appointment may be got over, because he is clerk of the peace until removed, and until validly objected to in that capacity, yet it is a totally different thing when another person has been acting who does not pretend to be clerk of the peace, when a man of totally different functions, exercising an office of a totally different nature, appointed in a totally different way, when one who is not clerk of the peace either *de jure* or *de facto*, who is another clerk, the town clerk or the justices' clerk is acting. That is not a mere irregularity, —that is not an informality,—that is one person doing what another person alone by law is allowed to do, and is capable of doing, and no informality can be imputed to that. It is a want of substance, not a want of form. It is a want of the thing itself, and not an irregularity in doing the thing, and no waiver of that can take place; for the objection goes to the office, it goes to the jurisdiction in this case. Here the jurisdiction consists of the magistrates acting as justices in the Small Debt Court, and by means of the clerk of the peace issuing his warrant, which gives jurisdiction to them in each particular instance.

My Lords, on these plain principles, and upon the plain construction of the statute, especially agreeing as I do with the great majority of the judges of the Court below, I am hardly under the necessity of citing cases; nevertheless, there are one or two

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important cases, but one more particularly, in which all th points of the present case occur. I mean the very well know case of Cumming *v.* Munro. That case of Cumming *v.* Munro which is in 12th Shaw and Dunlop 61, contains precisely th same matter, for the question there was with respect to th sheriff clerk depute, who by his commission had no power t name a substitute; no power was contained even in the com mission to the principal clerk to name substitutes to his deputie Crawford, therefore, was not a clerk of the Court to any effect and his signature had no more force than that of any stranger, i was positively a nullity, and so it was clearly held in all th stages of that somewhat long litigation. But did nothing els occur in that case which makes the case analogous and paralle to the present? Most certainly there did; for it was said tha that was homologated or affirmed by waiver, and accordingl the very title of the case shews that, "Process, Citation, Homol "gation." The first point said to be decided in that case, (I am reading the marginal abstract,) is this: "A summons in an i "ferior Court, signed by the substitute of the sheriff clerk "depute, who had no power to name a substitute, held null an "incapable of being homologated." We shall see what th homologation was. It was his having, as was said, to exist here and which was nevertheless disregarded, "given due authority to "Crawford to act as clerk of the Court in subscribing sum "monses." This is the plea by Munro, which shews that tha very point was made, and that very defence taken against th action. "And it could be proved that Crawford's acting in tha "character had been recognised by all parties in the Sheriff' "Court, and particularly by Cumming, the very party com "plaining who was a practitioner before it." A very stron case, one may say of homologation, "at any rate the objectio "of Cumming was omitted at the proper season, and he wa "barred from pleading it." Nevertheless, notwithstanding tha this was taken to be a sufficient ground, and the proceeding wa

held absolutely null, and the summons was said to be no summons at all.

But, my Lords, there is another case of Hamilton v. Murray, 9 *S.* & *D.*, 143, in which the marginal abstract is "Action dismissed in respect the execution of citation was dated prior to "the summons," and the objection there was held to be fatal, "although not pleaded by the party who objected to the citation on a separate ground."

And a similar view was taken in the case of Stewart v. McRae, in page 261 of the same volume.

I ought to mention that there is another case of which a friend of mine has endeavoured to find the original report, and has failed, but we have a full account of it in the respondent's case where no name is given, and the interlocutor is stated to have been that of a Lord Ordinary not reclaimed against, and therefore the reporter infers not reported. It is a case which fully recognised the decision of Cumming v. Munro, to which I have adverted, and gave effect to that decision, as it states. And it appears from the particulars of that case, that that case was decided upon precisely the same grounds. Cumming v. Munro being actually cited in the course of the argument.

My Lords, for these reasons, I am clearly of opinion that the judgment in the Court below is well grounded, and I move your Lordships therefore, that it be affirmed, and of course with costs.

LORD COTTENHAM.—My Lords, I entirely concur in the opinion that has been already expressed by my noble and learned friend. It is a principle of the law of this country, and equally so of the law of Scotland, that where a special authority or jurisdiction is given by Act of Parliament, the provisions of the Act shall be strictly performed. The jurisdiction is given with all the accompaniments which the Legislature thought proper to engraft upon the enactments, and those provisions are not permitted to be departed from. The one part, as well as the other, is essential to the jurisdiction given.

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My Lords, many cases have occurred in both countries, illustrating this position. In this country many cases have occurred in which the jurisdiction was perfect, except as to the form of notice. One or two of those cases I propose to refer to, for the purpose of showing how strictly analogous the decisions in the two countries are, and how clearly both are founded upon principle. In a case which is referred to in the papers an order was quashed, because it only stated that *due* notice was given, whereas the Act required fourteen days' notice, and it is accompanied with this observation of the Court, "A defective "notice is not cured by appearance." There the objection was to the form of the order. The order stated that due notice had been given. The Act required fourteen days' notice.

Now, that is a rule which follows from the principle to which I have already adverted: the order or conviction or whatever it may be, if the jurisdiction is specially appointed, must state upon the face of it, all that is essential to the jurisdiction which it professes to exercise. And in that case the order stating only that due notice had been given, and the Act requiring fourteen days' notice, the order was quashed because it did not state that fourteen days' notice had been given.

My Lords, there is another case, the King *v.* Bagshaw, which is in 7th Term Reports, where there was an order which was quashed, because it did not state that a notice, such as the Act required had been given. And I cite this simply for what was said by the Court in disposing of the case. "Notice is the "foundation of the whole proceeding, and therefore it should have "been stated, for if no notice were given the trustees had no "jurisdiction."

My Lords, those cases proceed upon the ground, that the notice is an essential requisite to the special jurisdiction given.

Now, my Lords, what is the present case? This Act requires not only that notice shall be given, but that a particular well known officer shall be the officer to give the notice. That being

required by the Act, if that officer does not give the notice, then the requisites of the Act are not complied with. Notice by a stranger is obviously no notice at all, and consequently the case falls within precisely the same principle as those cases to which I have already referred.

Now it is not in dispute, there seems to be no ground upon which it can be disputed, that the officer in question from whom this warrant issued, was not the officer required by the Act. The officer required by the Act is the clerk of the peace or his deputy. The officer in question was the town clerk appointed by the justices to act as clerk of the Court. But the Act says, that the officer who is to do the act as clerk of the Court, shall be clerk of the peace, a well-known officer; or in a certain case a deputy appointed by him. It is, therefore, clear that the officer who issued this warrant, was not the officer appointed by the Act, he was not the officer to whom the Act confided the duty of issuing the warrant, and there was, therefore, no warrant and no notice. There was nothing in short which was required by the Act of Parliament, in order to bring the party into Court, or to give the justices jurisdiction.

That doctrine, which has been so clearly established by the law of this country, has been the doctrine established in the cases to which my noble and learned friend has referred in the law of Scotland. And it is equally essential there as here that all the requisites of an Act, giving a special jurisdiction, should be strictly complied with. These cases, indeed, are much nearer the present than those which I have referred to, because the case of Cumming *v.* Munro is precisely the same. Whether it be one objection or another the principle is precisely the same. In that case there was an officer, but one whose appointment the Act did not sanction, that is, it did not so sanction it as to make him the proper officer: and upon that ground the proceeding was held to be null, and the jurisdiction not to exist. Now whether it be that the officer is not the proper officer under the Act, from one cause or another is perfectly immaterial, neither in

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the one case nor the other was he the officer whom the
appointed to serve the process, and therefore, in the one case
in the other there was a defect in the jurisdiction attemp
to be exercised.

My Lords, the only other point would be whether the
cumstances of the party not taking the objection below wo
give the Court jurisdiction. Now it is quite clear, that the w
of jurisdiction cannot be cured by reason of the party appear
he perhaps not knowing the objection at the time, or not thi
ing fit to take that opportunity of making the objection.
Court obtaining jurisdiction by an Act of Parliament, can
exercise jurisdiction merely by the acquiescence of the part
The parties may so contract together as to prevent them fr
disputing what is done, but nothing short of such a case wo
give a jurisdiction which professed to be exercised under
provisions of an Act of Parliament, which provisions have
been followed; I concur, therefore, in the opinion which
been given by my noble and learned friend, that there is a fail
of jurisdiction in this case, which is the ground upon which
interlocutor proceeds.

LORD CAMPBELL.—My Lords, I have the misfortune to di
from my two noble and learned friends who have preceded m
respect to this case. There were two objections made to
validity of the decree of the Court of the Magistrates. One
that they had no jurisdiction at all, and the other was that
jurisdiction, if it existed, had not been properly put in mot
Now the first is overruled. It is allowed that the magistr
were a court of justice, having jurisdiction over the subj
matter; and looking to the 2nd and 3rd sections of the Ac
Parliament, it is impossible to doubt that for a moment. W
then, these magistrates are a court of justice, constituted by
statute to adjudicate in this case.

That being so, my Lords, whether a court of justice be
stituted by statute, or by common law, or by royal grant, se

to me to be wholly immaterial. Then the Court has jurisdiction over the subject-matter. This is a case competent to them by the Act of Parliament.

Such being the real objection upon the merits, let us see what is done. There are proceedings that are perfectly regular *ex facie*. There is, my Lords, a regular plaint by which a suit is regularly instituted before a Court of competent jurisdiction.

We next have the warrant; and I entirely agree with my noble and learned friend that that warrant is process. It is process to bring the other party before a tribunal constituted to decide the cause. That process is perfectly regular on the face of it.

Under this process the defender appears. He makes no objection whatever in the Court of original jurisdiction. The case is heard on its merits. He defends himself to the utmost of his power, and seeks to have a decision in his favour with costs. There is, however, a decision pronounced against him; and after the decree is finally pronounced by this Court of competent jurisdiction, when the complainer seeks to put that in force, the defender brings an action of suspension and an action of reduction, not having whispered any complaint against the jurisdiction in the Court below. Then if he is now right, this decree of the Court below is a nullity, and any officer or party acting under it who had gone and distrained upon the goods of the defender, would have been liable to an action of trespass. The question, my Lords, is, whether that decree is to be considered a nullity or not.

Now, before your Lordships will come to that conclusion, I must beg leave to draw your attention most particularly to the 14th section of this Act of Parliament which I submit to your Lordships, is most specially, and anxiously, and emphatically framed to obviate such a frivolous and vexatious objection. The 14th section, my Lords, is in these words:—"And be it further enacted, that the decree given by the said justices in any case competent to them by this Act, shall not be subject to advoca-

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" tion, nor to any suspension, appeal, or other stay of execution, " excepting only in the case of consignation, as hereinbefore pro- " vided for the purpose of a rehearing before the justices, nor " shall be set aside or altered in an action of reduction before the " Court of Session on any other ground except that of malice and " oppression on the part of the justices; nor shall any such " action of reduction be at all competent, after the expiration of " one year from the date of the decree of the justices." Therefore even for malice and oppression on the part of the justices, after one year from the date of the decree, no process of advocation or reduction is to be permitted.

My Lords, the only question upon the construction of this Statute is this: Is the case in question competent to the justices? for those are the words of the Act of Parliament. " That the " decree given by the said justices in any case competent to them " by this Act, shall not be subject to advocation." Now your Lordships will be good enough to recollect that it is not said in any case where the process has begun originally, according to the directions that are pointed out in this Act of Parliament, but it is in any case " competent to the justices, that is, any case which " might be competently brought before them, and over which " they had jurisdiction by the Act of Parliament."

Now, my Lords, I cannot doubt for a moment, indeed such is the unanimous decision of the Court below, that this was a case competent to the justices. Then if that be so, are you to allow advocation? Are you to allow a process of reduction? My noble and learned friends who preceded me have truly said, that if you inquire into the fact, it turns out that Mr. Adam Hay was not either clerk of the peace, or deputy clerk of the peace. That is perfectly true, my Lords, but I say that you ought not to inquire into that. The foundation of my opinion is this, that under these circumstances, it is not competent to the party to make the objection.

My Lords, this is process. It is process to bring the party before a Court of competent jurisdiction. After the parties have appeared before the Court of competent jurisdiction, they cannot

object to the process, however irregular. The stage for making that objection has passed by, and after the parties have been convened before the proper tribunal, and have been heard, and a decree has been pronounced, the process by which they have been brought there is not subject to any objection, upon the ground of irregularity. It is quite unnecessary to inquire into the character that Mr. Alexander Hay actually held. He did the act. He had been acting for years in this capacity. But I do not at all rest my opinion upon that ground; I rest my opinion upon this, that after the decree, after the party had been heard, having made no objection, that without even the 14th section of the Act of Parliament, he could not now be heard to make the objection; but I say that the 14th section of the Act of Parliament has been introduced on purpose to prevent any such objection being made, and that this Act of Parliament expressly excludes both advocation and an action of reduction. Surely, my Lords, it is a reasonable view that the Legislature should interpose to prevent such objections, because a most serious mischief would ensue, if after a final decree such objections could be made.

My Lords, I proceed in this case upon the grounds which I stated yesterday in the case of Cleland v. Paterson, which I think rests precisely upon the same foundation. The case of Cleland v. Paterson, was a case where there was a trial before Lord Cockburn, in which the parties appeared, and after the verdict, the losing party objected to the jurisdiction of the Court. It was admitted that there the Court might have jurisdiction. It was admitted that if the form had been gone through, that jurisdiction might have been given, but it was objected that the form had not been gone through. I say, my Lords, that after appearance, and after trial, and after verdict, it was not competent to the party to make that objection. And for the same reason, my Lords, I say that here, after the party had been heard before the justices, and after a final decree, it was not competent to him to make any objection on the ground of the regularity of the process.

My Lords, it is unnecessary for me to enter at length into

cases decided either in England or in Scotland. I think th they all may be distinguished from this case, and that the would be no difficulty in distinguishing any of the cases to whic my noble and learned friends have referred. But, my Lords, is not suggested that any such case has been brought before yo Lordships, or that this House has given a sanction to any suc principle. If there had been cases in the Court below, ever s much in point, not being brought before this House, I, thinkin that they would be entirely contrary to principle, and in the teet of the Act of Parliament, should not feel myself bound by then Under these circumstances, my Lords, my opinion is that th interlocutor ought to be reversed, but of course my noble an learned friends who have preceded me, being of a contrary opinio your Lordships will come to a different conclusion, and the m tion of my noble and learned friend will have the sanction of th majority of this House.

LORD BROUGHAM.—My Lords, if my opinion had been at a altered by what has fallen from my noble and learned friend, would at once have said so, and so I believe would my noble an learned friend near me, (*Lord Cottenham;*) but I ought to sa that I by no means omitted the consideration of the 14th sectio of the 6th of Geo. IV., cap. 48. On the contrary, I rather thin I have marked it in my copy. But it just brings the case roun to the question of jurisdiction, because it says " to which jurisdi " tion they are competent." Now, my argument is worth nothin if they were competent to it, but in my opinion, they were n competent to it. Consequently the 14th section does not appl It is *idem per idem.*

Ordered and adjudged, That the petition and appeal be dismisse this House, and that the interlocutors therein complained of be affirme with costs.

J. ATKINS—GRAHAM, MONCRIEFF and WEEMS, Agents.

[Heard 20*th February*, Judgment 25*th April*, 1845.]

MRS. FRANCIS RENNIE, with consent of her Husband, and her Husband for his interest and their Children, *Appellants*.

JAMES RITCHIE, Stationer in Edinburgh, *Respondent*.

*Trustee*.—A deed by a trustee, in whom the trust estate was vested for the purpose of paying the truster's debts, and thereafter exercising a discretion as to the proportion of the rents to be paid to a life-rentrix by way of aliment, whereby the trustee assigned the trust estate to a creditor of the trust, until he should, out of the rents, have discharged his own debt and other incumbrances, *found* to be void as *ultra vires* of the trustee.

*Husband and Wife.—Assignation*.—A deed executed by a married woman, whereby she assigned a fund given for her aliment secluding the *jus mariti*, found to be void, as having been executed without the concurrence of her husband, who at the time was absent from the kingdom for a temporary purpose.

*Ibid. et Ibid*.—A deed whereby a married woman assigned as a security for repayment of money, paid at her request to her husband to enable him to retrieve his affairs, a fund which had been given for her aliment secluding the *jus mariti*, and which was declared not to be attachable by diligence, or assignable, or subject to any deeds which she might grant, was *found* to be void as defeating the terms of the gift.

ROBERTSON, the brother of the appellant, Mrs. Rennie, died in the year 1832, leaving a trust disposition and settement by which he conveyed his estate to trustees, of whom Captain Robert Barclay was one upon certain trusts, which were expressed in these terms:—

"*First*, That my said trustees shall, from the produce of my "means and estate, provide for and pay all my just and lawful

" debts, and deathbed and funeral expenses, and the expense of " executing the present trust, *and that either by a gradual liqui-* " *dation thereof, or otherwise, as they may deem proper or expe-* " *dient. Secondly*, That my said trustees shall, in the event of " the said Frances Clementina Robertson or Rennie, my sister, " surviving me, provide and pay to her the free annual profits or " produce of the said subjects and effects hereby conveyed, *or such* " *part thereof as they may deem necessary for the support of her* " *and her family;* and that at two terms in the year, by equal " portions, beginning the first term's payment thereof at the first " term of Martinmas or Whitsunday that shall happen after my " death, and so on half-yearly during the lifetime of my said sis- " ter, declaring that the foresaid provision to my said sister is " purely alimentary, and exclusive of the *jus mariti* of her present " or any future husband; and that it shall not be attachable by " arrestment or diligence of any kind whatever, nor assignable, " nor subject to any deeds which either she, or her present, or " any future husband may grant in relation thereto, or debts " which they may contract. *Thirdly*, That in the event of my " said sister predeceasing me, or in case of her surviving me, " from and after her death, my said trustees shall hold the said " subjects for behoof of her children procreated of her present or " any subsequent marriage, and shall divide the same equally " among them, and the survivors of them, share and share alike, " the shares of the sons to be payable on their attaining majority, " and those of the daughters on their being married or attaining " majority. But declaring always, that the said provisions to the " said children, shall not become vested interests in them, until " after payment or conveyance thereof, by my said trustees in " their favour respectively, unless any of them shall die before " payment or conveyance, leaving issue, in which event the pro- " vision to him or her so dying shall devolve upon, and be con- " veyed or paid to his or her surviving issue, share and share alike; " and if any of the said children shall die without issue, and

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" before conveyance or payment of his or her provisions, the same " shall belong to and be equally divided among the survivors; " and I appoint my said trustees, after the death of my said sister, " to pay and apply the annual profits and proceeds of the estate, " or so much thereof as they may think necessary, towards the " maintenance, clothing, and education of her said children, *and* " *that without the advice or interference of the said Richard Rennie* " *in any respect*; and my said trustees shall also have power to " make such advances to the children of my said sister, from the " capital of their shares, as they may deem expedient for establish- " ing them, or any of them, in business."

The settlement gave the trustees a power to sell and to appoint new trustees and factors, and declared that they should each be liable for his own intromissions alone. Barclay was the only trustee who accepted.

Part of the estate left by Robertson, consisted of a shop in the city of Edinburgh, which was burdened with an heritable debt of 1500*l*. Mrs. Rennie was entitled in her own right, to a shop adjoining Robertson's. Ritchie, the respondent, advanced 400*l*. to Mrs. Rennie's husband, and took from Mrs. Rennie, a security over her shop for its repayment. At the request of Barclay, Ritchie made various advances towards payment of the interest upon the 1500*l*. debt, the repair of Robertson's shop, the maintenance of Mrs. Rennie's family, and the advancement in life of her husband, until he had become creditor for a considerable sum of money.

In the year 1834 the affairs of Rennie, the husband, became so desperate, that he escaped to Canada with money supplied to him by Ritchie at the request of Mrs. Rennie, his object in going there being to establish himself as a farmer, and afterwards return and take out his wife and children.

On the 23rd September, 1835, while Rennie was as yet in Canada, Barclay executed a deed in favour of Ritchie, to which Mrs. Rennie adhibited her signature as a consenting party.

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This deed recited Robertson's trust settlement, and "That "in the execution of the said trust, I, in the year 1832, with the "concurrence and approbation of the said Mrs. Frances Clemen- "tina Robertson or Rennie, took the assistance of the said Mr. "James Ritchie, who at her request, and with my sanction, not "only made necessary advances from time to time to her, for the "maintenance and support of her family, but also paid various "claims attaching to the said property in Princes-street, Edin- "burgh, and made sundry payments to account of interest of the "said heritable debt of 1500*l.* sterling, affecting the same; by all "which the said James Ritchie is now in advance for me, as "trustee foresaid, the sum of 474*l.* 17*s.* 8*d.*, including interest "to Whitsunday last on the said sum of 400*l.*, for which he "holds a disposition, as aforesaid, conform to fitted account, "docqueted and signed by him and the said Mrs. Frances Cle- "mentina Robertson or Rennie, and by me, as relative hereto; "and also considering, that in order to put the said trust-property "in Princes-street, Edinburgh, into a state for being let more "productively, it was lately found necessary to make extensive "repairs and alterations thereon, by which considerable expense "was incurred to tradesmen and others, whose accounts, amount- "ing to 355*l.* 11*s.* 9*d.*, conform to list subscribed as aforesaid, "as relative hereto, are still unpaid: And now, seeing that until "the said sums of 474*l.* 17*s.* 8*d.*, and 355*l.* 11*s.* 9*d.*, are liqui- "dated and paid from the said subjects, the said Mrs. Frances "Clementina Robertson or Rennie has agreed to accept, by way "of aliment therefrom, for herself and her family, of such sum or "sums as I or my successors in office may, with reference to the "terms of the said trust-deed, consider ourselves warranted in "the circumstances to allow and pay for the above purpose, but "not exceeding the sum of 60*l.* sterling per annum; and that "on condition of my granting these presents, in manner under- "written, the said James Ritchie is willing, not only to abstain "from using any legal proceedings against me or the said trust-

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"estate, for recovery of the said debt of 474*l.* 17*s.* 8*d.* due to "him, but also to satisfy and pay the claims of the said trades- "men and others, upon the said property, amounting to the said "sum of 355*l.* 11*s.* 9*d.*, so as to prevent accumulation of expense "by any legal proceedings at their instance; and further, to pay "the interest of the said debt of 1500*l.* sterling, as the same shall "fall due."

Upon this recital, Barclay, "with the consent" of Mrs. Rennie, assigned the leases of the trust property to Ritchie, and gave him power to receive the rents until the purposes of the assignation should be fulfilled. These purposes were declared to be payment of the debt of 1500*l.*, the premium of insurance on the property, the public taxes, and the interest of the debt of 400*l.*, owing by Rennie to Ritchie. The further purposes of the assignation were declared in these terms:—"*Secondly*, For payment "to the said Mrs. Frances Clementina Robertson or Rennie, for "aliment to herself and her family, of such sum or sums as I or "my foresaids may consider ourselves warranted as aforesaid, to "allow and pay to her, for the above purpose, but not exceeding "the sum of 60*l.* sterling per annum. *Thirdly*, For payment to "the said James Ritchie of such remuneration for his trouble in "the premises as may be fixed and determined by parties "named; and, *Lastly*, For applying the balance of the said "yearly rents or tack-duties towards the gradual liquidation and "payment of the several sums of 474*l.* 17*s.* 8*d.*, and 355*l.* 11*s.* 9*d.*, "until the same, with interest thereon, at the rate of four per "centum per annum, shall be fully paid and extinguished, when "the said James Ritchie shall be bound and obliged to repone "and retrocess me or my successors in the said trust, in and to "the foresaid tack-duty and rents above assigned; it being always "in the power of the said James Ritchie, in the event of the "rents of the said property falling off, so as to be inadequate to "the purposes of these presents, to renounce this security, on "giving me, or the trustee acting for the time, six months' pre-

" monition in writing, and to use all legal measures for payment " of the sums that may then be due to him, in the same manner " as if these presents had not been granted: Providing always, " that the said James Ritchie, by acceptance hereof, shall be " bound and obliged to hold just count and reckoning with me, as " trustee foresaid, or my successors in the said trust, for his intro- " missions with the said rents hereby assigned; and that he shall " be obliged to lay annual states thereof, properly vouched, before " the said Alexander Stewart and Thomas Ranken, upon the " 15th day of June in each year, the first state to be furnished on " the 15th day of June, 1836, for the period from the date hereof " to that time, which assignation above written, I with consent " foresaid, bind and oblige myself and my foresaids, to warrant from " all facts and deeds done or to be done by me in prejudice hereof."

A docquet was endorsed upon this deed, which was signed by Barclay and Mrs. Rennie, declaring that they had examined the accounts of Ritchie, that he was a creditor of the trust estate for 474*l.* 17*s.* 8*d.*, and that he was thereby authorized to take credit for that amount in a new account between him and them, and the trust estate.

Rennie did not succeed in the object with which he had gone to Canada, and he returned to his family in Scotland, sometime in the year 1836.

In the month of July, 1837, Ritchie, upon a statement that he had made the various payments which, by the assignation of 1835, he was stated to have either already made, or undertaken to make, brought an action to have it declared that that deed was valid and binding upon the parties to it; his summons containing consequential conclusions for payment out of the rents of the trust estate of the money he had advanced.

The appellants pleaded in defence to this action, and at the same time brought a counter-action against Ritchie and the executors of Barclay, who was now dead, for reduction of the assignation of 1835 and the docquet endorsed upon it, contain-

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ing consequential conclusions for an account of Ritchie's intromissions under the assignation, with the rents of the trust estate, and for payment of the balance on the account, if any.

In support of the action of reduction, the appellants pleaded,

"I. The assignation is reducible, as being incompatible with "the provisions of the trust-deed, by virtue of which, it bears to "have been granted, and *ultra vires* of the trustee.

"II. The docquet subscribed by the pursuer, Mrs. Rennie, "ought also to be reduced, as having been granted without due "information or protection, to the prejudice of herself, a married "woman, and her children, at least, in so far as it affords any "support to the assignation, or affects the rights of the bene-"ficiaries under the trust.

"III. The defender cannot retain the funds in his hands, to "the prejudice of the beneficiaries under the trust, in satisfaction "of any other advances than such as were purely alimentary, "and made for behoof of Mrs. Rennie and her children."

The respondent and Barclay's executrix, on the other hand, pleaded in defence to the action of reduction:—

"I. There is no ground, either relevantly stated or truly "existing, on which the assignation and docquet can be rightly "brought under reduction.

"II. The action is unnecessary, superfluous, and incom-"petent, the same grounds of reduction being competently and "sufficiently brought into discussion in the declarator of validity "at the defender's instance.

"III. The defender is not bound to enter into any accounting "with the pursuers, except on the footing of the deeds now "challenged being valid, which he has always been ready to do, "and has in fact sufficiently done.

"IV. In any event whatever, the defender must be regarded "and dealt with, in regard to the present subject of discussion, "as being, (1st,) a just and lawful creditor of the trust-estate of "Lieutenant Robertson, for all the advances made to, or on

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" behalf of, that estate; and, (2dly,) a just and lawful alimen-
" tary creditor of Mrs. Rennie, for all the sums advanced to her
" for the maintenance and support of herself, or at her desire, of
" any of the other members of her family; and as, in this cha-
" racter of creditor, he is entitled to affect the rents of the sub-
" jects in question, to an extent at least equal to the sum for
" which he holds the assignation in security, all right or interest,
" on the pursuer's part, to prosecute the present reduction, is
" thereby excluded."

The pleas of the parties in the action of declarator at the respondent's instance, so far as regarded the question decided on this appeal, were substantially the same as in the action of reduction.

In December, 1838, the Lord Ordinary, (*Moncrieff*,) before answer, remitted the action of declarator to an accountant to report as to the accounts of the respondent, and to specify his claims under the different heads under which they were made, as creditor for debts paid of Robertson the original truster, for advances made in respect of the trust estate, for advances made to Mrs. Rennie, for monies advanced to her husband, and for expenses of management and commission. The accountant reported as to these various particulars, and from his report it appeared, that part of the 474*l.* 17*s.* 8*d.*, for which the assignment of September, 1835, had been given, was composed of sums which had been paid by Ritchie to Rennie, at the desire of Mrs. Rennie, while living in family with her for the general purposes of the family, and also upon his going to, and while he was in Canada, for his own purposes.

After obtaining this report, the nature of which, so far as material, will appear from the Lord Ordinary's note to be found further down, the Lord Ordinary, (on 20th May, 1840,) conjoined the two actions, and pronounced an interlocutor, containing the following among other findings:—

" Finds, that the question concerning the competency and
" validity of the deed of assignation by Captain Barclay, the

"trustee, and Mrs. Rennie, so far as it may be necessary to "determine the question, is materially different in regard to the "interest which may be in the children of Mrs. Rennie, as the "parties ultimately entitled to the fee of the property, and in "regard to the interest of Mrs. Rennie herself, as in the right of "an alimentary provision of a defined character exclusive of the "husband's *jus mariti*; and that any question concerning the "validity of the docquets called for is also different from that "relating to the deed of assignation: Finds specially, that there "is no relevant ground alleged for reducing the docquets, so far "as they are probative instruments, under the hand of Captain "Barclay, and import deliberate acknowledgments of the cor- "rectness of the accounts referred to, and his sanction to the "various articles expressed in them, so far as the same might "depend on his accession or homologation, without prejudice to "the legal effects of the said docquets in other respects, and "subject always to the correction of any errors which may be "pointed out, and the taxation and disposal of business accounts, "as hereinafter reserved: Finds that the deed of assignation, "dated 23rd September, 1835, is not legally valid or effectual, "in so far as any interests vested in the children of Mrs. Rennie, "as ultimate fiars of the property, may be affected in any man- "ner in which they could not have been affected, if the said deed "of assignation had not been executed: Repels the objections "to the accountant's report generally, and approves thereof, as "correctly ascertaining the state of the accounts between the "parties, subject to the reservations therein and hereinafter ex- "pressed: Finds that the deed of assignation and the docquets "relative to it, so far as they import a qualified and temporary "assignation by Mrs. Rennie of her liferent right in the future "rents of the property, for security and payment of debts con- "tracted by her for the aliment of herself and her family, which "are found, on investigation, to be just and true debts, are not, "in the circumstances in which they were executed by her and "Captain Barclay, *liable to reduction at the instance of her or*

" *her husband*, and that, so far as they were executed for security " and payment *of advances on account of debts which constituted* " *preferable claims against the trust-estate, or the rents thereof*, " she has no title or interest to insist for reduction of them."

To this interlocutory the Lord Ordinary subjoined a note which contained the following among other observations:—

" NOTE.—The general character of this case is too clear to " admit of doubt. The pursuer, Mr. Ritchie, has had the mis- " fortune, with no selfish motive even alleged against him, to " involve himself in the affairs of Mr. Rennie and his family, " and through a series of years to make continual advances to " them, out of mere friendship to them, and truly for their bare " subsistence. Mr. Rennie had confessedly no means of his own, " and no employment during all the time, and there is nothing " more certain than that the advances made by Mr. Ritchie were " all made on the earnest solicitation of Mrs. Rennie, for the pre- " servation of herself and her family, and that the particular deed " which is brought under challenge in the extraordinary terms of " the summons of reduction, was substantially no more than what " not only she, but Mr. Rennie also, had in the most express " terms pledged themselves to grant, while drawing with the most " pressing urgency on the friendship and resources of Mr. Ritchie. " It was truly observed in the debate, that ingratitude is not a " legal defence of deeds which may be ineffectual in law. But it " does give a very singular complexion to this case, when it is " seen, on the one hand, that the pursuers of the reduction, after " raising a summons which charged their former friend with the " most infamous and fraudulent conduct, in the very acts which " they had done with their eyes open, when the Lord Ordinary " at once sent that for trial to the jury roll, immediately aban- " doned all those charges, and allowed the cause to be discussed " on the footing that they could not be maintained; and when, " on the other hand, it is found, upon the strictest investigation, " that Mr. Ritchie's accounts, and his whole conduct, stand per- " fectly pure and correct, admitting of no impeachment of his

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"honour or integrity, and that if there was error in the transac-
"tions which bring him into Court, he was only drawn into it
"by the parties who are now opposed to him, and with the most
"benevolent motives towards them.

"The Lord Ordinary has thought it only what is due to a
"party so situated to say thus much; and he is convinced that
"no one who studies the case as he has done can have any other
"impression. Nevertheless, from the complexity of the transac-
"tions, and the peculiar nature of the deed objected to, he has
"found no small difficulty in extricating the cause in a manner
"satisfactory to himself, according to the justice of the case, and
"with safety to the law. He is relieved from entering into much
"detail, by the very clear statement in the accountant's report,
"the perusal of which is sufficient to give every one a distinct
"understanding of the precise nature of the transactions of the
"parties, and their true rights towards one another. He must
"own, however, that it was a surprise to him, not having then
"read the report, that at the end of the debate it came out, that
"if Mr. Ritchie's accounts are really correct, and his claims con-
"stitute just debts against Mrs. Rennie, (of which he has no
"doubt,) there is truly no remaining subject of controversy con-
"cerning the assignation, because the debt is either fully paid, or
"there must be funds in the bank for paying it, and Mr. Ritchie
"can have no objection when that is done to discharge the assig-
"nation. There are a few points on which the Lord Ordinary
"thinks it necessary to add some observations.

"1. He has not the least doubt that all the articles objected
"to under the 3rd article of the accountant's abstract are correct
"charges for advances for *aliment* to Mrs. Rennie and her family.
"The accountant has gone into the particulars with great care.
"The material objection is, that in a number of instances the
"money was given to *Mr. Rennie* himself, while *living in family*
"with his wife, and having no other means of subsistence. The
"accountant has demonstrated that, in the most material article,

" making one-half of the sums objected to, if not a great deal
" more, the payment was made *at the express request of Mrs.*
" *Rennie* and Captain Barclay. And, both for the reasons stated
" by the accountant, and because it appears to the Lord Ordinary
" that the particular *mode* of making the payment is of little con-
" sequence, when it clearly appears that the money was given for
" *the support of the family*, he cannot think that the objection to
" any one of these *bonâ fide* payments could with any justice be
" sustained.

" The defenders object strenuously to the sums of 50*l.* and
" 20*l.*, which were given to Mr. Rennie when he went to
" America. When one reads the correspondence relative to this
" matter, it must be thought a very hard objection. Rennie was
" bankrupt, and fled from Scotland, and writes, that if he returned
" *he must expect to go to prison*, and then both he and Mrs. Ren-
" nie beseech the pursuer, in the most piteous terms, to make these
" advances to him that he might go to Canada, promising a deed
" of the very nature of that which was ultimately granted. The
" money is given, and Rennie is absent for two years, constantly
" soliciting more. And when this sum of 70*l.* is at last stated as
" part of the *aliment* of this family, being the only means of *ali-*
" *ment* of the head of it for two years, it is maintained by *Mrs*
" *Rennie herself* to have been unwarrantedly given, and she and
" he together try to throw the pursuer (which is all that can be
" done) on the bankrupt husband as his only debtor. The Lord
" Ordinary cannot think that this is consistent either with law
" or justice. In the simplest view, it was but giving about a
" *seventh* part of the income of Mrs. Rennie in two years for the
" *aliment* of her own husband, who had no other means.

" 2. Strong objections are made to the articles embraced by
" the 8th head of the abstract. These also are minutely discussed
" by the accountant. They relate to repairs and meliorations on
" the property. Here again the chief objection is, that the repairs
" were not all executed under the express orders of Captain Bar-

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"clay. It is not denied that they *were executed*, nor is it said "that they were *not necessary* or *useful*. It is denied, indeed, in "words, that the alterations made increased the rent. But it "seemed to be admitted in the debate, that even these alterations "were *necessary* for enabling the trustee to let the trust-property "profitably at all, because, without joining it with Mrs. Rennie's "separate property, the whole could not be put in a state for "advantageous letting. The explanation, however, is, that "Captain Barclay very naturally allowed Mr. Rennie to superin- "tend the repairs which were required; and the idea of the "repairs having been made on the credit of Mr. Rennie, besides "being incredible in the circumstances in which he stood, and "according to the known rights of the property, is contradicted "by the fact, that the tradesmen employed did all consider them- "selves as employed for the trust.

"But, in truth, there is a short answer to these objections "(not adverted to); *all these articles* are comprehended in the "account which was docqueted by *Captain Barclay, and em- "braced by the assignation*, and whether that deed, *as an "assignation*, was within Captain Barclay's power or not, his "*probative* acknowledgments of the expense of these repairs "and meliorations are liable to no challenge whatever, when "the allegations of fraud are withdrawn. He was a man "completely *sui juris*, and after he, with the *concurrence of Mrs. "Rennie herself*, has deliberately recognized and sanctioned these "debts, contracted for *repairs of the trust-property*, it is surely "out of all question to say that they are not trust debts, merely "because they may have been made through the instrumentality "of Mr. Rennie. They amount in all only to about *one half- "year's rent*, and they were evidently necessary deductions, before "the free annual produce allotted to Mrs. Rennie could emerge.

"5. When the accounting is extricated, there is little re- "maining of practical matter for judgment. But, no doubt, the "pursuers of the reduction insist for judgment upon that. The

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" grounds of reduction which remain, are simply, that Mr
" Rennie was a married woman, that her husband did n
" concur in the assignation, and that the alimentary provision
" declared not to be assignable by the trust-deed. The questic
" is, whether *Mrs. Rennie* and *her husband* are entitled to redu
" the deed on these grounds, with reference to the circumstanc
" under which it was granted. The Lord Ordinary thinks th
" they are not. In so finding, he does not mean to decide a
" abstract question, but only finds that *these parties* are *not e*
" *titled* to reduce *in the circumstances of this case.*

" In the first place, it is settled by the case of Monypenn
" *v.* Lord Buchan, &c., July 11th 1835, that, notwithstandi
" the strongest clauses of this nature, excluding arrestment a
" assignation, an alimentary provision may be assigned *for a*
" *mentary debts.* Laying the trustee aside, therefore, *Mrs. Renn*
" could effectually assign *her alimentary right* for security a
" satisfaction of alimentary debts *previously contracted;* mo
" especially, considering the extent of it; and that a reasonab
" aliment was reserved. If she had done this simply, it wou
" have been the same case with Buchan; and the case in th
" point is not altered by the intervention of the trustee.

" In the second place, though Mrs. Rennie was a marri
" woman, the *jus mariti* of her husband was expressly exclud
" in the very constitution of the liferent right, by a third part
" her father. This is not the case of a *renunciation* of the *j*
" *mariti* by the husband, in a right conferred by himself. It
" the case of a total exclusion of it by a third party, establishi
" the right itself. Yet, even in the other case, the decisions a
" very strong in favour of the power of the wife to act by herse
" *See Ivory*, p. 128, and the case of Keggie *v.* Christie, May 2
" 1815, in which a lease granted by a married woman, liferentri
" without the concurrence of her husband, was sustained,
" respect of a clause of renunciation in a deed of separatio
" There was some general words added in that case, and it w

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"declared that the wife's receipt should be sufficient. But that "was the case of a *renunciation* by the husband of a right other- "wise vested in him, which always made a difficulty with our "lawyers. Here the *jus mariti* was excluded *from the first* by "the act of a *third party*, and there cannot be a doubt that in "this case the receipt of Mrs. Rennie herself was a sufficient "discharge to the trustee for money paid to her. That accord- "ingly was all that was ever required, and she indeed would "have been in a pitiable state if it had not been so held. For "here there is a strong specialty. At the time when the assig- "nation was granted, Rennie the husband had left the country, "and *had done so in contemplation of a permanent residence* in "a distant part of the empire,—can it be said that Mrs. Rennie, "thus left alone with her children, could not deal with the "alimentary fund from which the *jus mariti* was excluded, "because her husband could not concur with her? She certainly "had power to draw and discharge it, otherwise she must have "starved. But if, under the difficulties in which her husband "left her, she contracted debts for the aliment of herself, and of "him, and of the children, could she not assign *a portion of her* "*alimentary right for a time for the discharge of these alimentary* "*debts*, just as well as Lord Buchan could for the same purpose? "The husband, by leaving the country for permanency, had "ceased to exercise his office of curatory, even if that were "supposed to apply to a fund like this. The wife was living in "an actual state of separation, in which she *must* have had power "to act for herself, in relation to what was *her exclusive pro-* "*perty* to all the effects that were competent, that is, to the "effect of satisfying the claims *for aliment* which were due "by her.

"But it is to be observed, besides, that in this case, if there "were any difficulty arising from the idea of anything being done "without the consent of, or approbation of the husband, as if "any undue advantage might be taken, there is the clearest

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" evidence that what was done, was *substantially what the hus-*
" *band himself had recommended, and solemnly promised should be*
" *done*, before a great part of the money was advanced, and the
" woman had, besides, the advice and concurrence of the trustee,
" and the very respectable man of business employed by him.

" It being certain, therefore, that the whole transaction was
" entered into in the most perfect *bona fides*, the Lord Ordinary
" is of opinion, that in the special circumstances of the case,
" there are no sufficient grounds for reducing it at the instance
" of Mrs. Rennie and her husband. Yet there is, in fact, no real
" interest now involved in the reduction, except as it may affect
" the question of expenses, the rights of the parties in these rents
" being in fact practically resolved."

The appellants reclaimed to the Inner House, which adhered to the interlocutor of the Lord Ordinary. Subsequent interlocutors of the Lord Ordinary and of the Court, were pronounced, explicating the accounts between the parties, on the footing of the assignation of 1835 being a valid deed.

The appeal was taken against the whole interlocutors.

*Mr. Anderson* and *Mr. Mc Queen* for the Appellants.—I. The deed of 1835 was an obvious breach of trust. A trustee cannot capriciously, or without good cause, retire from a trust once accepted, or substitute another in his stead, unless in as far as directly authorized so to do; still less can he denude of the trust-estate and so deprive himself of the exercise of that care and management of the estate, and of that discretion in regard to the objects of the trust, which the truster has in view at creating it. One prominent object which the truster in this instance had in view, was the protection of his sister against the necessities of her husband, but the course pursued by the trustee, was entirely to defeat this object. Another object of the truster was, that the trustee should exercise his personal discretion in regard to the proportion of the income to be allowed to his sister

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for her support, but of the power to do this, the trustee, by the assignation wholly deprived himself, for the discretion was to be exercised from time to time, according to varying circumstances, whereas the assignation fixed the allowance permanently at 60*l.* per annum.

II. The assignation was void as granted by a married woman without the concurrence of her husband, whose marital curatory had in no way terminated by his temporary absence, and whose consent was therefore necessary, in order to the validity of any deed by her, though embracing her separate estate alone, and not affecting any interest of the husband. *Ersk.* I. 6, 22, & 27.

III. The assignation was further void, inasmuch as the life-interest of Mrs. Rennie was not assignable—the annual payment which she was to receive under Robertson's settlement, at the discretion of the trustee, was to be purely alimentary, exclusive of the *jus mariti*, and was not to be assignable nor subject to the debts or deeds, either of her or her husband. As an alimentary fund it was not arrestable, *Ersk.* III. 6, 6, 7, and still less was it assignable, independently of the terms of the settlement, unless for debts purely alimentary, not to the husband or to the family generally, but to the wife herself. *Ersk.* I. 7, 14, and III. 5, 2; Heriot's Trs. *v.* Fyffe, 12 *Jur.* 28. And though this had been doubtful, the clause in the settlement restraining assignation would be sufficient to make the assignation void. Though in the ordinary case, a restraint against assignation may not be effectual as being repugnant to the free use of property which is implied in every gift, unless there be a gift over in case of an attempt to assign, yet in the case of married women, such a restraint is essentially necessary to protect them from the influence of their husbands—without it, a gift to their separate use, or excluding the *jus mariti*, would plainly be ineffectual. It is upon this principle that clauses against anticipation have received effect in England, Tullett *v.* Armstrong, and Scarborough *v.* Borman, 4 *My.* and *Cr.* 377. And upon the same policy the clause prohibiting assignation should receive effect in

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Scotland. Here the debt for which the wife's separate estate was assigned, consisted for the greater part, not of money advanced to herself, but to her husband, either while in family with her, or while separated from her.

The *Lord Advocate* and *Mr. C. Baillie* for the Respondent.—I. The deed of assignation did not transfer the trust from Barclay to Ritchie, it merely assigned the trust estate to him for the temporary purpose of a security for the debts owing to Ritchie on account of the trust estate—the radical right was still in Barclay.

II. The *jus mariti* was expressly excluded, and at the date of the assignation, the husband was in America. To prevent the property being brought to sale for payment of the truster's debts, and secure those repairs which were necessary in order to make the property productive for her own maintenance, was a measure both prudent and necessary. The granting of assignation was therefore a prudent and necessary act to which, in the absence of the husband, his consent was not necessary, Cunningham *v.* Cunningham, 3 *Brown's Supp.* 593, Keggie *v.* Christie, 18 *F. C.* 374. Obligations by a married woman without the consent of her husband, when he is abroad and separated from her are good, where they respect her separate estate, and are necessary for the support of herself or her children, Hogg *v.* Little, *Mor.* 5955, Russell *v.* Pattison, *Ibid.*, Gairns *v.* Arthur, *Mor.* 5954, Neilson *v.* Arthur, *Mor.* 5984, Churnside *v.* Currie, *Mor.* 6082. Orme *v.* Diffors, 12 *Sh.* 149.

III. The whole of the free rents were not by the settlement declared to be alimentary; all to which this character was given, was only such part of them as the trustees should deem necessary. The proportion necessary was, with the consent of Mrs. Rennie, fixed at 60*l.* as the maximum, all beyond that was not alimentary, nor subject to the rules applicable to a fund of that nature, but fell under the general power of the trustee. Even if the whole had been alimentary, assignment, or attachment, by

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diligence would not be absolutely excluded, but only in so far as aliment was proper and reasonable. Monnypenny *v.* Buchan. 13 *Sh.* 1112. *Stair* III., i. 37. *Bank* I., 16. Waddell *v.* Waddell, 15 *Sh.* 121. Here, as already said, the aliment reasonable and proper was fixed at 60*l.*, the payment of which was one of the purposes of the assignation. Beyond that sum it was competent to assign the fund for aliment past due, and so far as this formed part of the consideration for the assignation it was unchallengeable. But as already noticed, the fund assigned was not alimentary; and without the assignation, it would have been in the power of the respondent to have attached for payment of the monies owing to him, not only the rents, but the fee itself of the property. Indeed the assignation was not strictly an assignation by Mrs. Rennie of any thing. It was truly an assignation by Barclay the trustee, as a security for the repayment of monies which the respondent had paid for him, or in other words, had lent him in order to pay for the purposes of the trust.

LORD CAMPBELL.—This cause turns upon the validity of a deed of assignation, dated 23rd September, 1835. The respondent brought a process of declarator to have this deed found valid; and the appellant a process of reduction to have it set aside. The two processes being conjoined, several interlocutors have been pronounced by Lords Ordinary, and by the Second Division of the Court of Session, the effect of which is to decide, that as far as the interest of the appellants is concerned, the deed is valid.

As it appears to me that the conduct of the respondent in the transactions was honourable, and that the object of the parties to the deed was fair, I regret very much to be obliged to come to the conclusion that the deed cannot be supported, and that the interlocutors appealed against ought to be reversed. Notwithstanding the great anxiety displayed by Lord Moncrieff, I am bound to say, that I think the cause has not been "extricated by him with

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"safety to the law." We have to lament that the Judges of the Second Division have not favoured us with their sentiments upon any of the important and difficult questions which were discussed before them; and we must suppose that they adopted simpliciter the note of the Lord Ordinary.

Three main exceptions were made to the validity of the deed:—1st, That it was a breach of trust in Captain Barclay; 2dly, That it was void by reason of Mr. Rennie, the husband, not being a party to it; and, 3dly, That it was *ultra vires* in assigning an alimentary fund provided for the maintenance of a married woman, declared by the settler not to be assignable.

Lord Moncrieff was of opinion, that Mr. and Mrs. Rennie were not at liberty to object to the validity of the deed of assignation, because they are supposed to have promised Mr. Ritchie a security of this sort for his advances made at their request. But to give effect to such a promise would entirely deprive a married woman of the protection intended for her, by conveying property to a trustee for her sole and separate use. A promise involving a breach of trust could not be enforced, and no such promise by a person under disability can prevent that person, if prejudiced by the breach of trust, from complaining of it.

Now I am of opinion that Captain Barclay was guilty of a breach of trust to the prejudice of Mrs. Rennie, by executing the deed of assignation. By the settlement of Lieutenant Robertson, the second trust was that the trustees should pay to Mrs. Rennie, his sister, if she survived him, the net annual proceeds of the property conveyed, or such part thereof as they might deem necessary for the support of her and her family during her life, "declaring that the foresaid provision for my said sister is purely "alimentary and exclusive of the *jus mariti* of her present or any "future husband, and that it shall not be attachable by arrest-"ment or diligence of any kind whatever, nor assignable, nor "subject to any deeds which either she or her present or future "husband may grant in relation thereto, or debts which they

"may contract." By the settlement the trustees are to manage the trust property, paying the settler's debts, and after the death of Mrs. Rennie, to hold the property for the benefit of her children. But by the deed of assignment, Captain Barclay, the only acting trustee, with the alleged consent of Mrs. Rennie, makes, constitutes, and appoints Mr. Ritchie his lawful cessioner and assignee of the whole trust property, first for the payment of certain charges affecting the trust property, secondly, for payment to Mrs. Rennie "for aliment to herself and her family of such sum "or sums as I may consider myself warranted to allow her "for the above purpose, but not exceeding the sum of 60*l.* per "annum," then for payment to Mr. Ritchie for his trouble, and lastly, for repayment to Mr. Ritchie of 474*l.* 17*s.* 8*d.* and 355*l.* 11*s.* 9*d.* with interest, when Mr. Ritchie was to re-convey to the trustee. But while this deed is in operation, Captain Barclay's functions, as trustee, are suspended. He cannot manage the trust property, and he cannot exercise his discretion as to whether a greater sum than 60*l.* a year from the annual proceeds of the trust property, should or should not be allowed to Mrs. Rennie for the support of herself and her children. The discretion of the trustees upon this subject was to be exercised from time to time, according to the state of the fund, and the circumstances of the family. No power is given to the trustees appointed by the settlement to name another trustee for the management of the property, or to disqualify themselves from exercising the discretion reposed in them. The deed of assignation, therefore, appears to be *ultra vires*, and a breach of trust, and the offer made by the pursuer to denude the property when the debt due to him is liquidated, must be unavailing.

Secondly, I am likewise of opinion that the deed is void, on the ground that it was executed without the concurrence of the husband. It was admitted at the Bar, that Mr. Rennie's concurrence would have been necessary if he had been living with his wife, and that it is to be excused only by his absence

in Canada. There can be no doubt that by the law of Scotland, under certain circumstances, a married woman may contract obligations, and execute deeds, as if she were single, but that is where the husband has been convicted of a crime by which he is civilly dead, or where he has deserted his wife, and the coverture is virtually dissolved or suspended. But here there was merely a temporary separation by mutual consent. Mr. Rennie intending to return to Scotland if he could not advantageously settle in Canada, and Mrs. Rennie intending to follow him thither if he could. The case therefore does not vary from any temporary absence of the husband for business or pleasure, during which his curatorial rights over his wife are not suspended.

The third objection to the deed is still more material. It is not disputed that the law of Scotland recognizes the settlement of property as an alimentary provision for a married woman, and that it may be made not assignable, or subject to debt or diligence, according to the principles upon which many cases have been decided in England, which are all to be found cited in Tullet *v.* Armstrong, 1 *Bevan*, 1 and 4 *Milne & Craig*, 377. But it is said that there is an exception in favour of alimentary debts, and that the items in class 3 of the accountant's report, making up the aggregate of 513*l.* 0*s.* 3*d.*, are for alimentary advances to Mrs. Rennie. It is unnecessary here to inquire how far an alimentary fund can be anticipated for past alimentary debts, because it seems to me quite clear that none of these items were the alimentary debts of Mrs. Rennie. The advances were to Mr. Rennie, or for the support of the family while he was living in England, and for the whole amount he was personally liable. The debts, therefore, were the debts of the husband and not of the wife, and for the debts of the husband I am of opinion that an alimentary fund so appropriated for the maintenance of the wife, cannot be assigned.

Lord Buchan's case is not at all in point, and the case of

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Herriot's Trustees *v.* Fyffe appears to be a strong authority, if any were wanting to support so plain a principle.

It thus becomes unnecessary to examine the 400*l.* not contended to be an alimentary debt, for the interest of which the trust property is made subject, nor to enter into any of the other items of the account.

On these grounds I am of opinion that the interlocutors supporting the validity of the deed of assignation, must be reversed.

The pursuer's summons contains an alternative conclusion to take the account, if the deed should be held invalid. But the account has not yet been taken on this footing. It would give me great satisfaction if this could now be done by consent between the parties after the opinion of the House has been expressed; but if this cannot be done, the cause must be remitted, that with the declaration of the invalidity of the deed of assignation, the account may be taken in the Court below on the footing of the original settlement. This, my Lords, is my humble opinion, and therefore I move, your Lordships, that the interlocutors complained of be reversed.

LORD BROUGHAM.—My Lords, I take entirely the same view of the case with my noble and learned friend who has addressed your Lordships. I consider the miscarriage of the Court below upon all the grounds to be clear; indeed, with all possible respect for Lord Moncrieff, (my respect for whom I need not say is equal to that of any person, from my long knowledge of his great talents, his profound learning, and his admirable judicial powers of every description,) I find it impossible to reconcile this case with principle; moreover, I really find it very difficult to reconcile it with another decision of Lord Moncrieff's, I mean the decision in the case of Herriot's Trustees, which appears to me to put part of the case, or one principle involved in the case, very clearly.

My Lords, I listened also to the objection that was taken to

an account being directed when there was a point of law to be decided. Now, that clearly was not a matter to go before an accountant, or to be mixed up at all with the accounts. And having separated that, and having now come to the resolution of deciding against the validity of the instrument, and of reversing the decree I most heartily join with my noble and learned friend in the wish expressed by him that by some arrangement a further expense of litigation to the parties may be avoided. If your Lordships shall be of opinion that this judgment ought to be reversed, (as you probably will) I would then fain hope that the parties might come to some understanding as to taking the account upon the alternative conclusion of the libel, and thereby upon this point avoid a more than necessary continuance of litigation.

LORD COTTENHAM.—My Lords, it appears to me, that if this interlocutor were to stand, it would be impossible hereafter to secure the interests of married women.

In this country, as in Scotland, it has been found necessary for the interests of society, that means should exist by which either the parties themselves by contract, or those who intend to give a bounty to a family, may secure that for the benefit of the wife and children, without its being subject to the control of the husband. In this country it is well known that that doctrine has been subject to considerable fluctuation from the time that it was first established, though it is now very firmly established, and no difficulty occurs as to the mode of carrying the object into effect.

When first by the law of this country property was settled to the separate use of the wife, equity considered the wife as a *femme sole* to the extent of having a dominion over the property. But then it was found that that, though useful and operative so far as securing to her a dominion over the property so devoted to her support, was open to this difficulty, that she being considered as a *femme sole*, was of course at liberty to dispose of it as a

*femme sole* might have disposed of it, and that of course exposing her to the influence of her husband, was found to destroy the object of giving her a separate property. Therefore to meet that, the provision was adopted of prohibiting the anticipation of the income of the property, so that she had no dominion over the property till the payment actually became due. That is the provision of the law as it now stands, and that is found perfectly sufficient for the purpose of securing the interests of married women.

In Scotland much the same course is adopted, the same objects have been worked out, though not precisely in the same way, but still there is by the law of Scotland, a protection in favour of an alimentary fund, and there is a provision that the alimentary fund shall not be assignable. These are two provisions very much corresponding with the provisions which have been adopted in the law of England. But if the present deed were to stand, there would be an end of that protection. This is not only an alimentary fund in its nature, but it is in terms declared to be so. It is declared not to be assignable, but it has been assigned, not for past aliment for the wife and her family, but for expenses incurred for the convenience of the family at large, or for the private expenditure of the husband. I think, therefore, upon that ground, that this deed is clearly bad.

It is also clearly bad as being a direct breach of trust. Captain Barclay had no right whatever to divest himself of the duties which he had assumed, and to transfer to others that discretion which was personal to himself.

It is quite unnecessary to find other grounds upon which to impeach this deed, the first being clearly and manifestly an objection which prevents this deed from acting, and prejudicing at all the interests of the parties, and therefore the interlocutor which gives effect to it, I consider as clearly erroneous. Whatever may be the interests of the parties, they are to be considered as existing independently of the deed.

My Lords, that is quite sufficient for the purpose of disposing of the subject-matter of this appeal. But although the accounts had been investigated before it was ascertained what the application of the law would be upon the particular finding of the accountant, it may be, that what has already been done may save the expense of future inquiry. That, however, I do not consider is now before us. Because the Court of Session having decided upon the first claim in the summons, the alternative conclusion has not been a matter of consideration in that Court, and I apprehend that the order of this House, suggested by my noble and learned friend on the woolsack, would entirely answer the purpose; that is, reversing the interlocutors appealed from, and referring it back to the Court of Session, to see whether there is anything else that may be done independently of the deed, for the purpose of doing what is right between the contending parties claimant upon this fund. I have no doubt that if the parties can arrange it privately generally speaking it answers the purpose of both parties better, but if they cannot agree, I do not anticipate any difficulty in the justice of the case being satisfied by whatever interlocutor the Court of Session may think proper to make, or may find themselves competent to make upon the pleadings, this House declaring that the deed is to be considered as void.

MR. MACQUEEN.—I hope that your Lordships will consider that this is a case in which justice requires that Mr. Rennie should have the costs in the Court below. We do not ask for the costs in this House. That would be contrary to all rule and practice. But under the circumstances of this case, which are as strong as can be well imagined, here is a trust—

LORD CAMPBELL.—My own opinion is, that this is not a case for costs, because this is a proceeding contrary to the agreement which Mr. Rennie had entered into, although that agreement in point of law is not binding.

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LORD BROUGHAM.—No, we cannot give the costs.

The parties intimating that they were not prepared to arrange matters, it was—

Ordered and adjudged, That the said interlocutors, so far as complained of in the said appeal, be reversed, and it is declared that the deed of assignation of the 28th of August and 23rd of September, 1835, is invalid. And it is further ordered, That with this declaration, the cause be remitted back to the Court of Session in Scotland, to proceed therein as may be just and consistent with this judgment and declaration.

PARSONS—GRAHAM, MONCRIEFF and WEEMES, Agents.

[*25th April*, 1845.]

COLVILLE GEORGE COLVILLE, ESQ., *Appellant*.

ANDREW COLVILLE, ESQ., *Respondent*.

*Tailzie.*—It is so settled, that, when an entailed estate comes into the possession of the last member of the entail previous to heirs whatsoever, the fetters are evacuated, that the House refused to hear an argument, whether the the character of the particular heirs whatever called in this case made any distinction between it and the cases on which the rule is founded.

IN 1727, Robert Lord Colville executed an entail of his lands of Crombie in favour of himself and the heirs male, lawfully "to "be procreate of our body, and the heirs of their bodys; which "failing, to the heirs female lawfully to be procreate of our body, "and the heirs of their bodys; which failing, to Robert Ayton, "our nephew, eldest lawful son of the second marriage of Sir "John Ayton of that ilk, deceased, procreate betwixt him and "Dame Margaret Colville, Lady Ayton, our eldest sister, and "heirs male of his body, and the heirs male of their bodys; "which failing, to the heirs female to be procreate of the heirs "male of the said Robert Ayton, his body, and the heirs of their "bodys; which failing, to Andrew Ayton, our nephew, second "son of the second marriage of the said Sir John Ayton, and "the heirs male of his body, and the heirs male of their bodys; "which failing, to the heirs female to be procreate of the heirs "male of the said Andrew Ayton, his body, and the heirs of "their bodys; which failing, to the heirs female to be procreate "of the said Andrew Ayton, his body, and the heirs of their "bodys; all which failing, to our own nearest heirs and assig-"nees whatsoever, heritably and irredeemably, but with and

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"under the burden of the provisions, conditions, limitations, "clauses irritant, and reservations after mentioned, which are "appointed to be insert in the charters, seisins, services, retours, "and infeftments." Then followed the fetters of entail.

In 1842 the appellant, as the nearest heir whatsoever of Robert Lord Colville the entailer, after the heirs female of the body of Andrew Ayton, and the heirs of their bodies, and assuming to himself the character as "consequently next heir of entail, failing "the heirs of the bodies of the said heirs female" under the entail, brought an action against the respondent, the grandson of a daughter of Andrew Ayton, and the person in possession of the lands of Crombie, to have it found that Andrew Ayton and his daughter had contravened the entail, and that thereby they and the descendants of their bodies had forfeited all right to the lands, and the appellant was entitled to the possession of these, as if Andrew Ayton and his daughter, or the descendants of their bodies, were actually dead.

The respondent pleaded among other defences that the appellant was not an heir of entail, and had no title to sue.

The Lord Ordinary, (*Murray*,) on the 25th January, 1843, sustained this defence, and dismissed the action; and the Court, on the 3rd March, 1843, adhered to his interlocutor. The appeal was against these interlocutors.

*Mr. Turner* and *Mr. Anderson* appeared for the appellant.—Mr. Turner, after reading the destination in the entail, was proceeding to shew in what respect it differed from that in the Earl of March *v.* Kennedy, *Mor.* 15412 and 15415, when the House, having caused a search to be made for the papers in that case, and procured the case for the appellant, stopped his further address, observing that the very point had been raised and decided by the House in that case, and again in Mure *v.* Mure, 3 *Sh.* & *McL.* 237, and that they could not allow the matter to be argued.

LORD CAMPBELL.—My Lords, in moving that the interlocutor

should be affirmed, I most exceedingly regret that the case shoul have been brought before us. I am sure I have a great respe for the Bar of Scotland. I do not know who signed this cas and I will not now inquire who signed it; but I do think th this honourable House ought to have some check upon the appeals. There is now a check which the House has interpose —it requires the certificate of counsel, in whom we repose co fidence, that it is an arguable question; and that certificate i intended to prevent vexation, and to prevent the perverse fee ings of parties urging them to do that which they cannot sustai and which must bring great expense upon themselves, and upo defendants; but in a case such as this, really your Lordships ar without protection.

Now, in the law of Scotland or in the law of England, I be lieve there is no position better settled than this, that if there b a strict entail with proper fettering clauses, when the estate come into the possession of the last substitute the fetters are at an end and it is in his hands to operate as a simple destination, so tha he may end it if he pleases; and it is only by his not exercisin the power that the limitation with the general words comes int effect. That was determined in the year 1760 by the Court o Session, and it was declared so in your Lordships' House i 1838.

Now, if after a question of that sort has been so settled, a the end of seven years the very same question is to be raise here, it is not, I think, very respectful to your Lordships, and i is very mischievous to the parties concerned. I therefore mus express my own individual hope, and I believe that my noble and learned friends agree with me, that there will be a litt more caution in future exercised before these certificates a granted, to see that there is probable ground for arguing the ca at your Lordships' Bar.

This, my Lords, is the third case within two days,—three su cessive appeals within these last two days at your Lordships' B

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in none of which have there been any probable grounds of argument. My Lords, the time of the House has been wasted, and the parties have been involved in useless expenses. I therefore, in moving that this interlocutor be affirmed with costs, throw out the suggestion which I have made, in order that it may be communicated in the proper quarter.

[*Mr. Turner.*—Your Lordship, perhaps, will allow me to make one observation.]

*Lord Brougham.*—No; you are not now at the Bar of the House.

*Lord Campbell.*—You cannot be heard now.

LORD BROUGHAM.—My Lords, in entirely expressing my concurrence in every observation that has fallen from my noble and learned friend, I do so with the utmost possible kindly feeling towards whoever signed these cases; but I say that it is the duty of the counsel to consider that it is not a mere matter of form. I am afraid, in signing certificates which are never in the hands of counsel themselves, but the draftsmen and the ingrossers, that they are apt to put their names to them as a matter of course. I consider that it is the duty of counsel not to put their names to a certificate, if there is no arguable point for us to consider. I think that it is a great grievance that we should have our time occupied by such an absolutely desperate appeal as this. The third case has been now before us, in which we have not called upon the respondent to say a word, being perfectly clear in each case in succession. We are bound by our own decisions upon the point, which, when you look into them, turn out to be on all-fours with the present, there is no specialty whatever in this case, we are therefore now called upon to hear our own decision re-argued. I entirely approve of the course which your Lordships have taken in refusing to hear this case. We have had two cases in which we have not called upon the respondent, and this, the third, is a case in which not only do we not call upon the respondent, but we do not hear the appellant himself.

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[*Lord Campbell.*—We are barred.]

LORD BROUGHAM. Nothing but an Act of Parliament c alter our previous decision. I find the judges in the Court bel are of the same opinion; Lord Jeffrey, (than whom a more skil and ingenious, and learned Judge never existed,) says, that he had been called upon to decide before the Cassilis case, might have felt a doubt, but that he is bound by that and t other case. Now the Cassilis case is not a case of the fi impression—the Leslie case was before it—and we have t authority of Lord Mc Kenzie, (that being likewise of gr weight,) and we have the authority of Lord Stair—there i word or two which may be supposed to qualify his opinion, l nevertheless he appears to have thought that the last substit held the fee simple, and that the tail in fee was gone. We ha therefore, all these cases, and the opinions of text writers, a the authority of the learned Judges with that of the Lord Pre dent Dundas, and another Judge, who originally differed fr the decision in the Cassilis case, but who came round and sa we are now bound by it because it is decided, and that being why should not the parties in this case be bound by it.

I therefore do hope, for the future, certificates will not given as a matter of course, and that it will be seen that it meant for a kind of protection for this House, otherwise t House will require other protection to prevent every one po being brought before it, for really these cases we have had to-c and yesterday go the extreme length. We shall next have appeal from a decision on an action to obtain the payment 100*l.* with interest upon a bill of exchange, (an undefended cau or from a decision that a man's eldest son has a right to the est as heir at law; all these cases may be brought before us the c after to-morrow, for anything I know. I see no reason why should not be told that these are arguable points.

My Lords, I entirely concur in the decision of my noble a learned friend, that this appeal be dismissed, and the judgm appealed from affirmed with costs.

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LORD COTTENHAM.—My Lords, I fully concur in all my noble and learned friends have said, and in the opinion that this appeal should be dismissed.

Although there appears to be no exact evidence of what took place in the Cassilis case, it appears to be universally assumed in Scotland to have decided this very point. Now it is impossible to distinguish the cases, and the learned counsel ought not to have allowed this case to come before your Lordships' House to review a point decided here eight years ago. One cannot understand it, there is no distinction between the cases, and it was no secret that the point had been disposed of, on the contrary, it was well known.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the Interlocutors therein complained of be affirmed with costs.

DUNN and DOBIE—DEANS, DUNLOP and HOPE, Agents.

[Heard 22*nd*. Judgment, 28*th April*, 1845.]

RICHARD GORDON, Trustee on the sequestrated estate of I
Munro, executrix of Daniel Munro, *Appellant*.

MATHEW HOWDEN, residing in Edinburgh, *Respondent*.

*Pawnbrokers*.—Held that a contract between two parties to carr
the business of pawnbrokers in the name of one of them alone,
lowed by the single name appearing on the business premises, an
the documents issued to and taken from the customers, was a
tract for a secret partnership, and illegal and void, as being cont
to the provisions and policy of the 39 and 40 Geo. III., cap. 99.

BY the 6th sect. of the Pawnbroker's Act, 39 and 40 Geo. I
cap. 99, it is enacted that every "pawnbroker shall insert in
" books the name of the thing pledged, the name of the pled
" and of the owner of the goods," and by the 33rd sect., it is ena
" from and after the commencement of this Act, all and e
" person or persons who shall follow, or carry on the trad
" business of a pawnbroker, shall cause to be painted or writ
" in large legible characters, over the door of each shop or o
" place by him, her, or them, respectively made use of for ca
" ing on that trade or business, the christian and surnam
" names of the person or persons so carrying on the said trad
" business, and the word 'Pawnbroker' or 'Pawnbrokers,' as
" case may be, following the same, upon pain of forfeiting the
" of 10*l*. for every shop."

For many years prior to and until the year 1827, the resp
dent had carried on the busines of a pawnbroker in Dicks
Close, Edinburgh. From 1827 to 1833, the name of "Jo
" Kidd" was substituted over the door of the premises for that
the respondent, which had previously been painted there.

In November, 1833, the respondent and Daniel Munro ente

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into a deed of partnership, whereby it was stipulated that "the "said parties having mutual trust and confidence in each other, "have agreed, and do by these presents agree, to be partners in "carrying on a joint trade and business as pawnbrokers in Edin- "burgh, under the firm of Daniel Munro, and that for the space "of five and a-half years, from and after the term of Martinmas "next, during which space it is stipulated that the said Mathew "Howden, who is well versed in the business, shall give such assist- "ance as he can with convenience to himself, in the management "and conducting of the business, he hereby reserving full power to "continue his business of appraiser and auctioneer, and to act "otherways on his own account, while the said Daniel Munro "binds and obliges himself, not to carry on any separate business, "but to devote his whole time and attention in conducting said "business, forming the subject of this copartnery. And for the "better regulating and carrying on of said business, the said par- "ties have resolved and agreed upon the following articles, *First*, "That the capital shall consist of the sum of 2000*l.* sterling, "and 1500*l.* sterling thereof is to be advanced by the said Mathew "Howden, and the remaining 500*l.* sterling, is to be advanced by "the said Daniel Munro, and that in such proportions, and at "such periods, as shall be required to carry on the business; and "for which sums so to be advanced the parties so making the "advance shall thereupon become creditors of the company for "the same, from the date of the advance by them respectively. "*Secondly*, That all bonds, bills, contracts, accounts, and other "writings relating to the said trade or business, shall be taken "and given under the foresaid firm of Daniel Munro; the said "parties shall keep, or cause to be kept, regular and distinct "books, containing all the affairs and transactions of the said joint "trade or business, and they shall post and bring forward, or cause "to be posted and brought forward, the books of the concern from "time to time, and the books shall be brought to a balance at "least every twelve months, and that upon the eleventh day of

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" November each year. *Thirdly*, That in respect the
" Mathew Howden is to advance the capital to the extent be
" stated, he shall be entitled to the sum of 150*l.* sterling for
" first year, and 180*l.* sterling per annum for the remaining
" and a-half years, out of the first and readiest profits of the
" business, and that he shall be entitled to draw the same re
" larly half-yearly, at the terms of Whitsunday and Martinn
" the first term's payment at Whitsunday 1834, and the n
" term's payment at Martinmas following, and so forth half-ye
" at these terms, during the period of this copartnery. But,
" the other hand, it is also stipulated that the said Daniel Mu
" shall be entitled to the whole residue or remaining profits of
" business, whatever the same may amount to, to be uplifted
" him, either at said terms, or if he shall prefer it, to continu
" be employed in the business. *Fourthly*, That as it may
" some time after the copartnership shall have begun to be ac
" upon before all the said stipulated capital sum shall be requi
" for the business, it is hereby agreed that for such part thereo
" may not be advanced by the said Mathew Howden, the fore
" stipulated sum out of the profits payable to him, shall suffer a r
" able deduction, in proportion as the amount thereof is to his
" portion or share of the capital sum to be advanced by him,
" which shall continue until the whole of his proportion of
" capital shall be invested in the business, and thereafter the
" Mathew Howden shall draw the full amount of his stipula
" share of the profits." The *fifth* article stipulated that the bu
ness should be carried on in the premises in Dickson's Cl
and that the Company should pay Howden rent for them
The *sixth* and *eighth* articles were in these terms. " *Sixthly*,
" case either of the said parties shall happen to die, the execu
" of him who shall predecease the other shall be entitled to
" share of the profits, and be under the obligations incumbent u
" him during the remaining period of the contract. *Eighthly*,
" said parties agree that if any difference shall arise betwixt th

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"anent the true meaning of any part of this contract, or other-
"ways in relation to the copartnery, they hereby agree to submit
"and refer the same to Andrew Rutherford, Esq., advocate,
"whom failing, to Thomas Walker Baird, Esq., advocate, either
"of whose decreet arbitral to be pronounced shall be final and
"binding upon parties."

In pursuance of this contract, Munro entered upon the active management of the business—his name alone was painted over the door of the business premises—the licences were taken out in his name alone—and the tickets and notes were issued in the same manner.

In June, 1836, Munro died, leaving a will, whereby he appointed his widow to be his executrix. Mrs. Munro confirmed the will, and continued the pawnbroking business, until the month of April, 1837, when her estates were sequestrated.

On the 29th of April, the respondent presented an application to the sheriff, setting forth the contract of copartnery between him and Munro, and praying possession of the partnership effects against the trustee on Mrs. Munro's estate, with the view of winding up the affairs of the company. Under this application, the respondent obtained possession of the funds and effects of the partnership by a decree of the sheriff finding that he was entitled to it, as the only solvent partner, for the purpose of winding up the affairs of the partnership. While so in possession, the trustee on Munro's estate adjusted accounts with the respondent to a certain extent, on the footing of his being a partner.

Thereafter, in the year 1841, the appellant brought an action against the respondent, for an account of his intromissions with the partnership effects, and for reduction of the deed of partnership, as void under the Pawnbrokers' Act; and also for reduction of the sheriff's decree.

The respondent pleaded in defence, that the deed of partnership was not struck at by the statute—that, if it were, the action

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in order to lie, should have been brought before the justices of the peace, and within twelve months of the offence, and that the interlocutors of the sheriff had been acquiesced in and homologated.

On the 25th of May, 1542, the Lord Ordinary (*Cockburn*) pronounced the following interlocutor, adding the subjoined note:—

"The Lord Ordinary having considered the process, and "heard parties, sustains the Reasons of reduction of the contract, "the additional contract, and the interlocutors libelled; decerns, "in terms of the reductive conclusion; and appoints the cause "to be called, in order that it may be settled how it is to be "proceeded with."

*Note.*—The Lord Ordinary put it "to the parties, whether "either of them wished to adduce any further evidence of the "fact that there was, or that there was not, a secret co-partnery, "but neither did.

"In this situation, and looking at the circumstances as they "are admitted or established already, the Lord Ordinary has no "doubt that such a concealed co-partnery did exist. The busi- "ness was not merely *carried on, de facto*, without the defender's "name being disclosed, but it *was a part of the original scheme* "that this should be done. Except in the private understand- "ing of the parties, as in their contract, or in the other pro- "ceedings known only to themselves, there is no trace of the "defender being a partner to be found. It was unknown to "the public and to the law.

"The Lord Ordinary holds the English case of Warner *v.* "Armstrong (3 Mylne and Keene, p. 45,) to fix that the "illegality of the co-partnery must be taken to be the legal "consequence of this secrecy. Even though there had been a "difference of opinion on that case between some of the "common law Judges and the Judges in equity, (which, how- "ever, does not clearly appear,) the Lord Ordinary would

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"prefer the opinion of the Lord Chancellor, not only because "it decided the case, and is the latest authority, but because he "agrees with it. He concurs in its view of the meaning and "policy of the statute.

"The defender's chief pleas against this result are:—

"1st. That the statute only imposes *penalties* and that even "these cannot be sued for after a year for a breach of the act. "The Lord Ordinary thinks that these are penalties for irregularities committed *in the course of conducting a trade not otherwise struck at by the act*, and that a statute condemning secret partnership, *on grounds of public policy*, cannot be defeated, and the secret partnership enforced merely by paying these penalties, or by a failure to exact them timeously.

"2nd. That *in turpi causa melior est conditio possidentis*. But whatever effect this maxim might have had, *as between the original parties*, the Lord Ordinary does not think it applies to the circumstances of the present case, in which all that has taken place is, that *a trustee acting for creditors*, and misled by the erroneous interlocutors now brought under reduction, has hitherto dealt and accounted with the defender as if the co-partnery was lawful. Besides, the defender was not content originally with his mere possession, but *expressly founded on the contract*, as the ground for his obtaining the interlocutors which he got from the sheriff, and which are now under reduction.

"What effect this reduction may have on the new accounting, "the Lord Ordinary does not now say, because the only conclusions debated are the reductive ones."

The respondent reclaimed to the Inner House, which ordered Cases by the parties, and upon advising these, pronounced the following interlocutor, "alter the interlocutor of "the Lord Ordinary reclaimed against, and repel the reasons "of reduction, in so far as they proceed upon an alleged violation of, or agreement to, violate the Pawnbrokers' Act; *Quoad*

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" *ultra* remit to the Lord Ordinary to proceed farther as to
" Lordship shall seem just."

The appeal was with leave of the Court below, against
interlocutor.

The *Lord Advocate* and *Mr. Shand* for the Appellant.—
contract is express that the business was to be in the nam
Munro alone, and the documents issued and received were li
wise to be in his name alone. The policy of the statute is
make as public as possible the names of " all and every per
or persons" carrying on the business, and for this purpos
requires that the names of the persons carrying it on shall
painted on the door of the business premises and appear in
documents issued. The stipulations of the contract, therefc
were in direct contravention of the terms of the statute, a
in defeat of its policy; the wealthy partner was to keep in
back ground, and the one of moderate means to be held fo
as the only person with whom the public was dealing, and
whom they could look in any case of liability or attempt
enforce the penalties of the statute for infringement of
provisions, although the express object of the statute was, tl
both should be known, in order that for the protection of
public, the statute might be enforced against both.

A contract of the nature in question being prohibited
the statute under a penalty, the statute is not satisfied by m
enforcement of the penalty. The contract itself is null a
void. Forster *v.* Taylor, 5 *Bar. & Ad.* 887; Fergusson *v.* N
man, 6 *Scott*, 794; Armstrong *v.* Warner, 3 *My. & K.* 45.

*Mr. Turner* and *Mr. Peacock* for the Respondent.—T
ground upon which the decision in Warner *v.* Armstrong we
was, that although the agreement *ex facie* was legal, by eviden
*dehors* the agreement it was shown to be illegal. The effect
the evidence there was to show a collateral illegal contract; b

in the present case no collateral agreement is either alleged or proved. The case therefore must depend on the terms of the written contract.

In Warner's case the party had not been a pawnbroker before, and the whole was a contrivance for a loan at high interest, under the cover of a partnership. Here Howden was himself a pawnbroker, and the contract was not one framed for evasion, but was *bonâ fide* for the purpose of partnership, and *ex facie* performance of it was perfectly compatible with observance of the statute. If the contract be lawful, the subsequent acts of the parties will not affect its legality; the fact of not painting the names of all the partners upon the premises may be punishable under the statute, but there is no covenant to that effect in the contract.

It seems questionable indeed whether the object of the statute was intended to go beyond this, that the name of those actually carrying on the business should appear, in order that action might be brought against them. Here Munro was the party actually carrying on the business. If this be so, no infraction of the statute has occurred, and even were it otherwise, if there be reasonable ground for inferring intention of compliance with the act, illegal intention will not be presumed. The omission to paint the respondent's name may have arisen from ignorance of the law, not from intention to violate it; but before the contract can be held to be illegal, it must be shown from the terms of the deed and from the acts of the parties taken together, that illegality was intended. A mere stipulation to carry on the business in the name of one out of two persons is not illegal, unless it can be shown that there was an intention to conceal the name of the other. The business might have been carried on in the name of one, and the names of both have been painted.

LORD CHANCELLOR.—We are of opinion, in this case, that

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the judgment of the Court below cannot be sustained. reference to the main point that has been under consider the policy of the law requires that all persons who carry c business of pawnbroking shall publish their names to the There are many reasons which have been assigned for this which it is not necessary for me now to enter, after th cisions that have taken place upon the subject, because i Court of Exchequer, when this question came before that in the case that has been alluded to, (Warner *v.* Armstrong Court decided that a secret partnership in the pawnbi business was illegal (2 *Cro.* & *Mee.* 284). The question wards came before Sir John Leach, Master of the Rolls, a also in express terms decided (3 *My.* & *K.* 61) that a partnership in the pawnbroking business was contrary t That case afterwards went before my Lord Brougham, wh held the situation of Lord Chancellor, and he affirmed th cision (3 *My.* & *K.* 64), and stated also his opinion, that a violation of the law to enter into a secret contract of co nership in the business of pawnbroking.

The question therefore, and the sole question is, wh this is a contract of that nature; whether it is a secret co for the purpose of carrying on the business of a pawnb Now this gentleman, Mr. Howden, had himself been a broker, and carried on business for a considerable time, is very difficult to suppose that he was not acquainted wi law connected with this subject. He afterwards, carryi another business, wished to take a partner into this busin pawnbroking, and for that purpose he took in Daniel M and a partnership was formed between them. But the fir pulation of that partnership contract was, that the bu should be carried on in the name of Daniel Munro, whic ports that it was to be carried on in that name alone, an Howden's name was not to be mentioned in the firm.

Now the Act of Parliament requires that persons ca

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on the business of a pawnbroker shall put their names over the door; the names of all the persons carrying on the business. If then the partnership-contract stipulated that the business should be carried on in the name of Daniel Munro, and Daniel Munro alone, that was implicitly a stipulation that Daniel Munro's name alone should be placed over the door, and even in that view of the case the transaction would have been illegal.

It was further stipulated that all bills and other instruments should be drawn solely in the name of Daniel Munro; all these circumstances appear to me to lead to the conclusion, (and it requires some evidence on the other side to prove that that was not the intention of the parties,) that Daniel Munro's name alone should be known in the business, and that it should not be known to the world that he had any partner. It was to be a secret partnership from the very terms of the contract. It is quite consistent with this case that the parties might have reserved to themselves the right of communicating to the world that Mr. Howden was also a partner, but it requires some proof on the other side, I think, to show that that was the intention of the parties. From the terms of the contract I think I am justified in inferring—and I can come to no other inference—that it was the intention of the parties that Daniel Munro alone should be known in the business, and that it should not be known that Mr. Howden had anything to do with the concern.

I think the points alluded to in respect to the arbitration, and also the registration, have been satisfactorily answered by the Lord Advocate. If any contests arose, those contests should have been rather presented to a Court of Justice than to private arbitration. And as to the registration, I apprehend that that was a mere matter of form, which was never acted upon, and which probably never was intended to be acted upon.

For these reasons, I am of opinion that the judgment of the

Court below should be reversed. If the opinion which I have expressed is correct, the interlocutor of the Sheriff was incorrect and ought to have been reversed by the Lord Ordinary, and in that case it is proper that it should be reversed here.

It does not appear to me that any other question arises.

LORD BROUGHAM.—My Lords, I so entirely agree in the argument so forcibly stated, and so correctly stated, by my noble and learned friend, that I shall not trouble your Lordship with more than a word or two upon the subject.

I hold it to be perfectly clear that this was an illegal contract, for the express purpose of doing an illegal act—that the stipulation was entered into that Howden's name should be concealed, and that Daniel Munro's name alone should appear. It appears to me to be quite inconsistent with the whole frame of this instrument that anything else should have been in the contemplation of the parties.

My Lords, I consider that this Pawnbroking Act, (as I stated in the Court of Chancery, in the case of Lewis *v.* Armstrong and in another case before me,) was a very politic and wise act. A great clamour was made before me in argument on the part of the pawnbrokers, that they were exposed to suspicion, and had to be a suspected class of individuals, and that it was treating them with indelicacy so to consider the act and to construe it. I remember my answer to that was a very obvious one, and which occurred to every one upon looking to the policy of this very beneficial act—that no honest, respectable pawnbroker would feel that there was an impropriety, or any indelicacy in being called upon to disclose his name, and the name of his partner with whom his business of pawnbroking was carried on; that it tended to prevent dishonest and fraudulent proceedings, oppressive to the poor as well as fraudulent in themselves, and tended to the encouragement and protection of fair traders, and to separate them from unfair traders. That no person, there-

fore, had any right to complain of the Act of Parliament, or of the mode of enforcing it.

Now as to what has been said with respect to the clause which requires an arbitration to settle disputes, such disputes must be settled, as my noble and learned friend stated, somehow. Now how that was to conduce to publicity, I am labouring under the same difficulty as my Lord Advocate in apprehending. But I conceive the most effectual publicity would have been to leave the law to take its course, and let the disputes that might arise under the partnership, be brought into public Court. Says Mr. Howden, "Let it be done by Mr. Rutherford, and if Mr. Rutherford cannot take it, take A. B." I forget who. Very well. The publicity was so great that they confided their secret to one individual instead of confiding it to the whole Court, and to all mankind! How that was to operate publicly I cannot tell.

As to registration, it is obvious that they need not register at all. If there had been a stipulation requiring, under a penalty, that it should within six months, or within any reasonable time be recorded in some public register, a very different aspect would have been given to the instrument. But that is not so. What the effect of that would be it is needless to stop to inquire. There is nothing of the kind at all.

I am, therefore, clearly of opinion that the sheriff's interlocutor was wrong, and that my Lord Cockburn was perfectly right in rescinding it; and I am of opinion that the Inner House, in altering the interlocutor of Lord Cockburn, were entirely wrong, and we must now reverse that decision.

LORD CAMPBELL.—My Lords, I have very little to add to what has been stated by the two noble and learned Lords who have preceded me. I was counsel at the bar in the case of Warner v. Armstrong, and I had the misfortune of being on the weak side, instead of the right side; but I do not doubt that

the proper construction was put upon the Act of Parliame by the then Lord Chief Baron, the Lord Chancellor, and t Master of the Rolls; and there can be no doubt that t partnership being in violation of the Act of Parliament, illegal, and cannot receive any other solution, because to s that it is merely subject to a penalty, would be entirely defeat the intention of the Legislature. Then, what we ha to consider is whether, if this agreement were carried in effect, the Act of Parliament was violated or not. And seems to me that this is a much stronger case than the ca of Warner *v.* Armstrong, because here there can be no dou the Act of Parliament would be violated, for the agreeme expressly stipulates that the business shall be carried under the firm of Daniel Munro. Then, if it were to be ca ried on under the firm of Daniel Munro, it would be whol inconsistent with that to put over the door the name of Ho den, because the business then no longer would be carried c under the firm of Daniel Munro, but under the firm of Mun and Howden.

There is an express clause in the Act of Parliament, whi declares that "From and after the commencement of th "Act, all and every person or persons who shall follow or ca "on the trade or business of a pawnbroker, shall cause to "painted or written, in large legible characters, over the d "of each shop or other place, by him, her, or them respectiv "made use of for carrying on that trade or business, the ch "tian and surname or names of the person or persons so c "rying on the said trade or business."

Then, my Lords, if the Act of Parliament is carried i effect, the agreement is violated; if the agreement is carr into effect, the Act of Parliament is violated. They can stand together. Mr. Peacock, in a very ingenious way in t stress of his argument, says there was a stipulation t the partner whose name was not to appear was to assist. T

makes the thing worse, because he carries on the business; and if so, then his name should have appeared over the door. But it is expressly stipulated that his name should not appear over the door. That construction of this clause of the agreement, and that section of the Act of Parliament, are quite sufficient to dispose of the case, and to show that this agreement is contrary to the Act of Parliament.

Ordered and adjudged, That the interlocutor complained of in the said appeal be reversed, and that the cause be remitted back to the Court of Session in Scotland, with directions to that Court to adhere to the interlocutor of the Lord Ordinary in the said cause, dated the 28th of May, 1842, recited in the appeal, and to decern in terms thereof. And it is further ordered, That the said respondent do pay to the said appellant the costs to which the respondent was found entitled by the said interlocutor of the 22nd of February, 1843, appealed from, if paid by the said appellant, and do pay to the said appellant the costs incurred by him in the Court of Session in the said cause.

SPOTTISWOODE and ROBERTSON—DEANS, DUNLOP, and HOPE—Agents.

[30th May, 1845.]

JAMES REDDIE and others, acting in name and behalf of t Parliamentary Trustees of the river Clyde, *Appellants.*

SAMUEL HIGGINBOTHAM, surviving partner of Messrs. To and Higginbotham, *Respondent.*

*Sale.—Vendor and Purchaser.*—Where a sale of lands is compul under the powers of an Act of Parliament, the purchaser must p the expence of the conveyance, unless the statute expressly thro it on the vendor.

THE appellants were trustees, having certain powers confer upon them by a variety of statutes for the purpose of improvi the navigation of the river Clyde.

The 17th section of the 3rd and 4th Victoria, c. 118, enac "That whereas it is essential to the execution of the wo "hereby authorized on the south side of the said harb "for enlarging the same, that the said trustees should acq "and take a portion of the works at Springfield belonging to t "company of Charles Todd and Higginbotham, whereby t "said works will be severed and rendered of little use, the sa "trustees shall be bound, and they are hereby required an "authorized to purchase the whole of the said works belongin "to the said company, with the ground on which the sam "stand, and the ground between the buildings of the works, a "and also the ground lying between the same and the riv "belonging to, or claimed by the said company, or by t "representatives of Charles Todd, as an individual, and with "six months after the date of this Act, unless the said parti "shall consent, by writing under their hands, to prolong t "said period, to ascertain, or cause to be ascertained, in t "manner provided by this Act, the value of said works a

"grounds, and the amount of compensation to be paid to the "said Charles Todd and Higginbotham, or the representatives of "Charles Todd, on account of the same being required and "taken from them for the purposes of this Act, and to pay such "value and amount of compensation, with interest thereon at "the rate of 4*l.* per centum per annum, from the expiration of "six months after the date hereof, till paid, to the said parties "respectively, or their assignees, in four equal instalments of "twelve, eighteen, twenty-four, and thirty months respectively, "after the date hereof; provided always, that, if it should be "necessary to ascertain such value and amount of compensation, "by jury trial, the jury or juries to be empannelled for that pur- "pose, shall consist of persons qualified as Commissioners of "Supply, in the counties of Lanark or Renfrew, or one or "other of them: provided also, that the said respective parties "shall be entitled to the occupation and use of the said works "and grounds, as tenants of the said trustees, for such period "as they may require the same, not exceeding two years and "six months from the date hereof, at the yearly rent of 4*l.* per "centum of the value and amount of compensation ascertained "as aforesaid to be due to them respectively."

The 90th section empowered persons under legal disability to convey to the trustees, and gave a special form of conveyance under which it should be lawful for them so to do.

The 94th section regulated the manner in which the value of premises to be taken under the powers of the statute, was to be ascertained by the verdict of a jury.

The 96th section enacted, "that, in every case in which the "verdict of a jury shall be given for the same or a greater sum "than shall have been previously offered by the said trustees, "for the purchase of any lands or heritages to be used or taken "by them for the purposes of this Act, all the costs, charges, "and expenses of summoning such jury, and of witnesses, and "of counsel, and of the trial, and of the bond hereinafter

" mentioned, to be given by the party requiring such jury to be
" summoned, shall be defrayed by the said trustees, and such
" costs, charges, and expenses shall be settled and determined
" by such sheriff."

The 99th section declared, that " it should be lawful for the
" said trustees, and their agents, workmen, and servants, imme-
" diately to enter, or, if they have entered, to continue upon
" such lands or heritages respectively, and then and thereupon
" such lands or heritages, together with the yearly profits
" thereof, and all the estate, use, trust and interest of any person
" therein, shall from thenceforth be vested in and become the
" sole property of the trustees and their successors, to and for
" the purposes of this Act for ever, and such payment, tender,
" deposit, or investment, shall not only bar all title, claim,
" interest and demand of the person entitled to or interested in
" such lands or other heritages, but shall also extend to and be
" deemed and construed to bar the courtesy of the husband
" and terce of the wife of every such person, and all other
" right, title, or interest of every other person whomsoever
" thereon."

The appellants took proceedings for having the value of the respondent's premises ascertained, and the jury summoned for that purpose found by their verdict that the appellants were liable to the respondent, as representing Todd and Higginbotham, in the sum of 43,733*l.* as the value of the premises taken, " and as compensation for loss and damage by the re-
" moval of their works, and the loss and damage their trade and
" business will sustain thereby."

The sum so found to be due was, under the 17th section of the statute, payable in four equal instalments. When the first of these became due the amount was paid, and it was then mutually arranged that 32,799*l.* 15*s.*, the balance, should remain a burden on the premises. A disposition under this burden was then executed by the respondent in favour of the trustees, the

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expense of which, including the stamp affixed to it, amounted to upwards of 550*l*. It was mutually alleged by the parties that this disposition was necessary to and was required by the other, but it was admitted by both that, according to the practice of the profession in voluntary sales, the expense of the conveyance is borne by the seller. In these circumstances the respondent brought an action against the appellants for payment of the expenses of the conveyance which had been paid by him to his solicitors.

The appellants pleaded in defence, that the pursuer's claim was not authorized by the statute, which confined him to the sum awarded by the jury, and that it was excluded by the practice of conveyancers, which imposed the expense upon him as the seller. The respondent pleaded in answer, that under the statute he was entitled to receive full indemnification without any deduction whatever, and that as the sale was compulsory, the expense of the conveyance could not be laid upon him.

The Lord Ordinary, (*Murray*,) on 13th January, 1843, sustained the defences and assoilzied the appellants, subjoining to his interlocutor the following note:—

"NOTE.—Both parties are agreed that the statute contains "no clause that provides for the payment of the conveyance in "question. It is therefore necessary to resort to some principle, "in order to decide how the expense in question should be paid. "If it had been a voluntary sale, the seller would, according to "ordinary practice, have defrayed the expense of the conveyance. "But the pursuer contends, that as it was a compulsory sale by "Act of Parliament, he had not the power of fixing his own price, "as voluntary sellers have, and that the price awarded by the jury "is to be regarded as mere compensation, and nothing more.

"It does not appear to the Lord Ordinary that he can, on the "ground that the sale was effected through the intervention of an "Act of Parliament, decide this matter otherwise than he would "have done, if the sale had been contracted for. A jury is en-

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"titled, in fixing the price, to take into view that the sale is not "voluntary, but enforced by Act of Parliament; and it is believed "they generally do so, and give at least as high a price as could "be obtained by any voluntary sale. But the price having been "fixed, he sees no other principle on which the case can be de- "termined, than viewing it as one in which there is no provision "as to how the expense of the conveyance shall be paid, and that "therefore it falls under the general rule, which attaches the pay- "ment of the conveyance to the seller. Whether the value fixed "in this case was as ample as it should have been, or not, the "Lord Ordinary has not even attempted to conjecture. But, on "general principles, he presumes it must have been as high as "could be obtained by any voluntary sale."

The respondent reclaimed to the Inner House, which, on 27th June, 1843, altered the Lord Ordinary's interlocutor, repelled the defences, and decerned for payment of 511*l.* as the expense of the conveyance, with interest and expenses.

*Mr. Bethel* and *Mr. W. L. Russell* for the Appellants.—By the 17th section the appellants were compellable to take the whole of the respondent's premises, whether they required them or not. In this respect they were in a worse position than purchasers under statutory powers usually are—they were in some respects involuntary purchasers, though in others the respondents were involuntary sellers. In cases of voluntary purchase the rule in Scotland invariably is, that the vendor pays the costs of conveyance. For the case of involuntary sale, no provision is made by law. The claim in the present instance, therefore, for the costs of the conveyance, must be founded either upon express contract, or upon the terms of the statute. No evidence has been given of any contract to pay them, and as to the statute the only conditions by which the appellants were to be bound are fixed by the 11th section which gives right to take possession "indemnification being always made in manner hereinafter men-

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"tioned," no mention is made of a conveyance in the other clauses, and therefore there might, or might not be a conveyance, except for the 17th sect. which was introduced by the respondents themselves—this made a conveyance necessary, but it is silent as to the expenses of it. The probability is, that the party represented to the jury that a conveyance would be part of the taking under the 17th sect., and that he would have to pay for it, and that the expense was taken into consideration by the jury at awarding the compensation; what the jury might do, they must be presumed to have done Manning *v.* East. Co. Railway, 12 *Mees & W.*, 248; but whether the matter were altogether omitted before the jury or not is immaterial, the statute is the rule between the parties, and if it were intended by it to give these expenses, it has not been done. It is *casus improvisus*, therefore, which no Court can supply, for it is not competent to raise the claim by implication of any contract to pay the expense. King *v.* Gardner, 6 *Ad. & El.* 112; Queen *v.* Sh. of Warwick, 2 *Rail. Cases*, 681; *Exparte* Turner, 1 *Wil.* p. 305; *Exparte* Passmore, 1 *Yo. & Co.* 75.

*Mr. Andrews* and *Mr. Stuart* for the Respondents.

LORD CAMPBELL.—My Lords, in this case I believe it is not necessary to trouble the learned counsel for the respondents to address you. It seems to me, and I understand that my two noble and learned friends are of the same opinion, that the interlocutor of the second division of the Court of Session ought to be affirmed. There is no doubt in this case, my Lords, that the rights of the parties are to be decided entirely according to the Act of Parliament—we are to put a just construction upon the Act of Parliament—we are not to interpolate anything into it; and, however deficient its provisions may be, it is our duty as a Court of Justice merely to interpret it. But, looking to the Act of Parliament, I am clearly of opinion that the Lord Ordinary

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miscarried, and that his interlocutor was properly reversed b the Second Division.

My Lords, this I think must clearly be taken to be a cor pulsory sale. The statute makes a contract between parties, a we are to put an interpretation upon that contract, and, accordi to the contract, it appears quite clear to me that the owners the property were to grant a conveyance to the trustees. Th is the clear spirit of the whole of the proceedings arising betwe the parties. Then, under these circumstances, the question aris upon whom was to fall the expense of preparing that conveyan and I think there can be no doubt in the world that that expen must be borne by the trustees. It would be quite monstrous say that that expense should be borne by the owners of the pr perty which was to be taken, for in many cases, if it were where small slips of property are taken, there might be a grea sum to be paid by the owner of the property, than he wou receive by way of compensation for his land.

Then, it being assumed that the expense of the conveyanc must, in some shape or another be paid by the trustees, coul that be taken into consideration by the jury? If the appellant be right, it must be supposed that it was taken into considerati by the jury in assessing the damages, and that mode of argu ment has very properly been adopted by the learned counsel fo the appellants; for it appears to me to be the only mode of rea soning with any colour of justice, if upon a just interpretation c the 17th sect. the jury ought to have taken this into consider tion. I think there is quite enough to show that the proper mod in which the owner of the property should obtain the expense the conveyance, is by making it an item of the contract, an not by afterwards bringing an action for it. But when I look the language of the 17th sect. I think it will not bear that co struction, because it says, "the value of said works and ground and the amount of compensation to be paid to the said Charl Todd and Higginbotham, or representatives of Charles Todd,

account of the same, being required and taken from them for the purposes of this Act." I do not think that that at all includes the expense of the conveyance, which could not then be ascertained. The amount of the stamp duty might be made matter of calculation, but the number and expense of the searches in the Register-office, the copies of deeds, and the consultations and opinions of counsel, the preparation and disposition of all those things could not by possibility have been made the subject of proof before the jury; and I do not think the jury would have been at all justified in taking that amount of expense into consideration. It is quite clear that the jury in this instance did not do so, and I think that the Sheriff who presided must be supposed to have directed them that they had no power to do so.

My Lords, if that be so, then the only mode in which the owners of the property can have the indemnification which the statute must be supposed to provide for them, is that when the disposition is to be executed, it shall be executed at the expense of the trustees. Looking to the 7th Article in the Condescendence, and the answer to it, I think that the fair result is, that the trustees asked for this disposition and the parties then came to an arrangement that the disposition should be executed.

But, my Lords, I do not think that that is very material, because I should apprehend that upon a just construction of of the Act of Parliament, the trustees were parties who were to have a disposition made to them, either at that moment, or at some subsequent time. If they were to enter into possession upon payment of the purchase money, still they had a right to make their title complete, by having a written conveyance executed by the former owners. Then at whose expense is that to be done? I think that the obligation is cast by the statute upon the former owner to execute such a disposition; I think that that is compulsory, but still it may be under an implied condition, that the expense shall be paid by the trustees. It is allowed that it would be so in England. Mr. Bethel allowed,

as he was bound to do, that in England it would be compulso upon the former owners to execute the conveyance, but then would be compulsory upon them to do so, on the conditi being fulfilled that the disposition should be prepared at t expense of the party in whose favour it was to be executed.

Then, my Lords, the whole turns upon the difference betw the custom in England and the custom in Scotland; if t property had been situated in England, the practice in Engl being that the purchaser shall be at the expense of the deed conveyance, it is allowed that although the former owners wo be compellable to execute the conveyance, it would be at t expense of the purchaser, it resolves itself then into this: there any difference, because there is a practice in Scotlan that where there is a voluntary contract for purchase and sa it is usual that the expense of the disposition should be pa by the vendor? My Lords, that custom cannot be at all su posed to be introduced into this Act of Parliament, that custo is only applicable to voluntary contracts between the parti and not to a case of this kind where there is a compulsory sa and where there is an indemnification intended, and wh without the expense being thrown upon the purchaser, it wo be quite impossible in many cases that that indemnificati should be complete. For these reasons, I am of opinion that t law raises a promise on the part of the trustees, that they sho pay for the expense of the conveyance which was to be execu in their favour.

This case differs totally from the King *v.* Gardner, and t other case of the Queen *v.* the Sheriff of Warwick, which w referred to, because there the only question which arose wa to the amount of the costs that were to be recovered, and it w only *qua* costs that they could be recovered; unless the Ac Parliament provided expressly and directly that certain su were to be recovered as costs, they could not be recovered costs. But here the case rests upon the ground that there is

implied condition that this expense should be paid by the purchaser. It clearly would be so in England; and although in Scotland there is a practice that in the case of voluntary contracts of sale and purchase, that expense falls upon the vendor, that practice cannot be supposed to be applied to a compulsory sale under the Act of Parliament.

For these reasons, my Lords, I have come to the conclusion that the interlocutor of the Lord Ordinary was erroneous; that it was properly reversed by the second division; and that the interlocutor which has been appealed from ought to be affirmed with costs.

LORD BROUGHAM.—My Lords, I take exactly the same view of this case as my noble and learned friend. Now, I am very far from denying that the legislature might so have enacted as to cast the expense of the conveyance upon the seller, though compelled by the force of the act to sell. But then, I am equally clear, that in order to be of opinion that the act has cast that expense upon the seller—(a thing so absurd —a thing so contrary to reason and justice in itself—a thing, if I may so speak, so violent)—it must be clearly shown, there must be no doubt about it. It must not be left to inference or implication, it must be clear and plain, that the legislature so meant. The legislature, being supreme, may do any act it chooses, and it would be indecent to say that any act which the legislature, the supreme power of the State, did, was either unjust, unreasonable, or absurd. If I had found the legislature saying in so many words, or by perfectly clear and necessary inference from the words which they employed, that the seller, though compelled to sell, should pay the expense of the conveyance of the property to the purchaser, who was authorized by the act to buy for his own benefit, and not for the benefit of the seller. As my noble and learned friend has very justly remarked, it shows still more clearly the monstrous absurdity

and injustice of the construction put upon the act, or rathe inference raised that the smallest piece of land in point of v and for which the jury must have given the smallest con sation, might have led to a conveyance attended by this expense. There might be the same covenants, the same a ance to the purchaser from the seller in that case as in at an expense of five or six hundred pounds, four-fift which would go as stamp duty to the Government. Yet, in that case—absurd, unreasonable, unjust and oppressive might be said to be, and properly said to be—if the legisl had actually used the words, then we must have submitt the supreme power of the State, and it would not have decorous to say, "You have done an unjust, unreasonab absurd thing." But then it must be very clear that it has so; and is that clear in this case? It is confessed that the l lature has not said so in words, it is a mere matter of infe from the custom in Scotland being different from the pra in England, the custom in Scotland being, that unless a s lation is made to the contrary, the seller pays the expen the conveyance. But does that apply to a compulsory For, unless the rule applies to a compulsory sale, we hav right to assume that the legislature would adopt it unle has used express terms to show such adoption. I appre it does not follow, and that we have no right to assume t rule which is intelligible enough, and operates no mischi the case of a voluntary sale, was intended by the legislatu be adopted by them to compel a party who is bound to s bear the expense of the conveyance.

No doubt our practice seems a more reasonable one that prevailing in Scotland, namely, that unless a stipulati made to the contrary, the seller does not pay the expense c conveyance. The purchaser prepares the conveyance fo own security, and pays for it. In England the mortgag lender prepares the security, as the purchaser would do, bu

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mortgagor or borrower pays for it. In Scotland it turns out that the seller both prepares the conveyance, as I understand the practice, and pays for it. I do not quite see that that is a very rational arrangement, unless there is some reason for it, which I do not perceive, because I should say that the seller is not the person who can be so safely trusted in preparing a good title for the purchaser, as the purchaser himself would be; and it is no reason, because he pays for it that he should prepare it, any more than it is a reason with us, that because the borrower, who, like the purchaser, pays for the conveyance of the mortgage to the lender of the money, should prepare the deed. The mortgagee prepares the deed, though he does not pay for it. In Scotland, I should say, upon principle, that if the seller is to pay for the deed, the purchaser ought to see that he gives him a good title, and the purchaser ought to prepare it. I think that would be the best course to take, and I do not quite see how the present rule operates in practice. Suppose I am a purchaser, and the vendor pays the expense of my conveyance, I may say, "This is not right and sufficient, I must have this and that search. I must have this proof of decease. I must have that proof of people being out of the way; and between the various claimants I must be satisfied that I have a good title." Then I may send it back and have it again prepared and revised, and added to and improved for my security, but at the vendor's expense. That is what strikes me, as a person ignorant in Scotch practice, to be the natural and rational observation that arises. But, however, nobody doubts the fact. It is not denied that, according to the Scotch practice, the seller pays the expense and prepares the conveyance. The question is, has the legislature adopted that rule in this totally different case of a compulsory sale? The act is silent; and I am not at liberty to raise any such inference as that the legislature has adopted such a custom.

Now, as to what is said of those cases of the King *v.* Gard-

ner, and The Queen *v.* The Sheriff of Warwick, I agree with m noble and learned friend, that they really have no bearing upo the present case at all, because there it was a question of cos to be paid. The question was, whether a certain amount costs, or a certain other amount of costs, was to be paid; a as I understand the case, which I have had an opportuni during the argument of looking into, it was not left to infe ence or implication from what was done, but the legislatu had actually dealt with the subject of the costs. It was argu on one side, that it was very unjust and unreasonable, a hard upon the parties not to give them so much more th was allowed; but the Court said, "We cannot do anything, t legislature is silent." But this case is totally different. It admitted on all hands here, that the compensation award by the jury, did not touch the expense of the conveyance. is admitted on all hands, that that compensation could not tou the expense of the conveyance—for, as I threw out early in t argument, how could they tell what the expense of the conve ance was, until after it was ascertained? It is also admitted th no evidence whatever was offered upon the point. Cons quently there is every reason to believe that the jury had not at all under their consideration; and from looking at the wor of the act, I do not think they authorize the jury to take it in their consideration.

Therefore it appears to me perfectly clear, I own, that i this case the interlocutor of the Court of Session was right i altering that of the Lord Ordinary. I must observe, befo concluding, that I have no manner of doubt that the party he had a right to a conveyance. It would be monstrous to sa that he was to take only that conveyance by force of the Act Parliament, which would give him no written title. He had right to a conveyance under the Act; and if he did not get th conveyance, he might have applied for it under the Act. take it for granted that the clause in the Act is merely a

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anxious provision, as it were, to give easy possession; but the right of the purchaser to the conveyance being under the Act, it was compulsory upon the seller, and therefore the common rule of the seller paying for the conveyance does not apply.

Upon the whole, therefore, I am of opinion that the miscarriage was on the part of the Lord Ordinary, and that the interlocutor of the Court altering it, ought to be affirmed, with costs.

LORD COTTENHAM.—My Lords, I think there is very considerable embarrassment in this case, from the very imperfect provisions of the Act, and from the rule prevailing in Scotland being diametrically opposite to the rule in this country, namely, that in ordinary cases of contract between party and party, the seller pays the expense of the conveyance. The first question is, whether that rule is applicable to a case of compulsory sale; because if this is to be treated and considered as a compulsory sale, I think it is perfectly clear, from all the provisions of the act, that the case of the appellant cannot be supported.

Now, in an ordinary sale, where parties agree between themselves as to the purchase-money, if the rule is known, it is not very material what way it exists, because the parties arrange amongst themselves as to the money to be paid, according to the rule prevailing one way or the other. If the seller has to pay the expense of the conveyance, of course he expects something more for the estate, and if the purchaser has to pay the expense of the conveyance, he expects to give something less, because the seller is relieved from the expense; therefore it is not very material, where the parties are agreed amongst themselves, as to the sum to be paid. But when you come by Act of Parliament, and compel a party to part with his property, and you propose to indemnify that party against all loss which he may sustain by being so compelled to part with his property, the rule certainly has no application. It would be obviously

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productive of great injustice, if in such a case the owner of a estate were compelled to part with it, and to pay the expen of conveying it to the person to whom, under the Act, he w bound to convey it. It appears to me, therefore, that althou one certainly would have been very glad if authority had be found for dealing with this subject, the reason for the ru which applies in ordinary cases, cannot possibly be applied the present.

Then we must go to the Act and see whether that gives a light. And now that the expense of the conveyance is not e pressly provided for is admitted on all hands. If it had been subject matter for the consideration of the jury, or I would say it might have been made a subject matter for the consideration the jury, that would have gone a great way towards establishi the case of the appellant, but I cannot read the clause whi has been so much commented upon, namely, the 17th clau without being perfectly satisfied that the framer of that clau and the legislature in enacting that clause, had no such subje matter in contemplation at all. What the jury are to inqui into and assess is, "The value of the works and grounds, a the amount of compensation to be paid on account of the sa being required and taken for the purposes of the Act." Nc if the jury were told by the presiding officer, that they w to set a value upon the injury that the party would sustain account of the works and grounds being "required and tak for the purposes of the Act," would it ever enter into th contemplation that they were to assess the amount of what t conveyance would come to? It is quite obvious that it w meant that they were not only to assess the value of the wor and grounds, but to compensate the party for the inconvenien and loss which he would sustain by those grounds and worl being taken from him. Whether it is a manufactory, or whatev the nature of the works may be, undoubtedly the taking of the would be a great injury to the party occupying them, a

carrying on his business there, beyond the market price of the works and grounds to any other person. That obviously is what the legislature intended by this provision, and that would appear to be the natural course to be adopted. We have the verdict before us, and the grounds of that verdict show that the jury had that in contemplation, and that they had not in contemplation any injury or damage beyond that. The verdict is, "Find the pursuers liable to" the other parties "in the said sum of 43,733*l.* sterling, as the price or value foresaid, and as compensation for loss and damage by the removal of their works, and the loss and damage their trade and business will sustain thereby." It is very distinctly stated in the finding of the jury, and very clearly expressed in the language of the act itself.

Then here is a party who has no means of getting compensation from the jury, to whom the jury had not assessed any compensation for the obvious injury which he sustains. The question is whether the Act intended to put him in that situation in which as has been before observed by my noble and learned friends, in many cases he might have to pay a very large proportion of what he would have to receive.

Now it is hardly necessary to advert to a particular provision in the act, because it is perfectly well known; but the 11th clause shows the obvious intention of the legislature in passing all these acts, and contains expressions which will meet the justice of the case, and which are not capable, as I conceive, of the interpretation which has been put upon them by the learned counsel for the appellants. By that clause the parties are to take the ground, "indemnification being always made to the owners, "lessees, and occupiers of such lands." If it had stood there, of course there would have been no question that the parties were to have full indemnification against all loss that they might sustain, and so beyond all doubt the legislature intended; but then there are these words, "in manner hereinafter provided." That refers to the scheme of machinery by which the indemnity

is to be ascertained, and the amount of the compensation found by a competent tribunal to which it is referred; it is not a qualification of the nature and extent of the indemnification, but refers to the mode in which the act is to be worked out; it cannot be supposed that any other construction was intended, because if so, it would not be full indemnification, but would be only a partial indemnification, and there would be only such partial compensation as the other provisions of the act might grant. It is quite clear that the act intended full and ample compensation and indemnification, and the words which I have observed upon, refer only to the machinery by which the act is to be carried out.

Then the whole spirit of the act and the tenor of the expressions used, are, that the party whose lands are taken, shall have full compensation; in one view of the case if the appellant's argument were right, he would have that compensation. The question, therefore, is not to be decided upon the real merits of the case, but it is to be decided upon the very terms, the expression, and scope of the act. It is quite obvious that if the party, the owner of the estate, is to pay the expence of the conveyance, he must sustain some injury. The jury have no power to ascertain, or give to him the amount of that expense. If, therefore, he is not to have it from the person in whose favour the conveyance is prepared, he must bear it himself, and by bearing it himself he must be a loser, provided the jury have done alone the duty of putting a fair value upon the property under consideration.

It appears to me, therefore, that this case is not at all regulated by the general rule in Scotland, and not at all effected by the cases which have been referred to; and that looking at the general scope of the act, and the real justice of the case, the vendors, the parties who were the owners of the estate, are entitled to the expense of the conveyance from the party purchasing it. For these reasons, my Lords, it appears to me that

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the interlocutor of the Lord Ordinary was erroneous, and that the interlocutor appealed from should be affirmed.

Ordered and adjudged, That the Petition and Appeal be dismissed this House, and that the Interlocutors, so far as therein complained of, be affirmed with costs.

RICHARDSON and CONNELL—G. and T. W. WEBSTER, Agents.

[Heard 12*th* Judgment, 26*th June* 1845.]

Mrs. DANIEL FISHER, and her husband for her interest, *Appellants.*

WILLIAM DIXON, one of the general disponees and executors of William Dixon, deceased, *Respondent.*

*Legitim.—Heritable and Moveable.—Held*, that machinery erected by a proprietor of land upon the land, and attached directly or indirectly to it, for the purpose of working the minerals under the land, (including in the machinery loose articles not physically attached to the fixed engines but necessary for their working, and so constructed as to form parts of the particular machinery and not to be capable of being applied to any other engines,) was heritable in a question between the heir of the party who erected the machinery and his other children claiming their *legitim*, without regard to the circumstance of the fixed machinery being capable of being removed without material injury, or to the view which the deceased had taken of the machinery as being heritable or moveable, or to the circumstance of the land having been purchased by the deceased with the view mainly of working the minerals under it, and of the machinery forming part of his stock in trade as a coal and iron-master.

*Legitim.—Heritable and Moveable.—Held*, that the machinery in an iron foundry erected by the proprietor of the ground on which it was built, in performance of a covenant in that behalf contained in a lease granted by him to a company, of which he himself was a partner, was heritable in a question as to *legitim.*

*Legitim—Heritable and Moveable.—Held*, that machinery erected by a tenant and removeable by him at the termination of his lease, was moveable in a question as to *legitim.*

WILLIAM DIXON, the father of the parties, died, leaving a will whereby he gave his whole estate, real and personal, to his two sons, (John Dixon, his eldest son and heir, and the

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respondent William Dixon,) as his universal disponees and executors. At his death, he left these two sons and four daughters, of whom the appellant was one. The appellant repudiated the provision made for her by the will, and claimed her *legitim*. The sons brought an action of multiplepoinding against the daughters; and Mrs. Fisher, on the other hand, brought an action of count and reckoning against the sons. In these actions which were conjoined, a question arose in regard to what part of the testator's estate formed the fund of his personal estate, out of which the *legitim* should be taken; and the respondent in litigating this question, did so, not only as the son of his father and one of his general disponees and executors, but as standing in the place of his elder brother, John, the heir of their father, from whom he had acquired by purchase the whole of his rights in their father's estate, as heir or otherwise.

During the latter years of the testator's life, he had been engaged in extensive business as a coal and iron-master, his outset in life having been in the same business, but in subordinate capacities. At his death the testator was possessed of the following properties, of which the history is subjoined to each:—

## I. CALDER COAL AND IRON WORKS.

This property consisted of a lease of the Calder colliery, and of a feu of twenty-five acres of land, part of the estate on which the colliery was situated. The feu had been obtained for the purpose of erecting steel and iron works. After these works had been erected, a firm of Creelman and Dixon, the testator being one of the partners, purchased the premises and feu right, and carried on extensive business in them as iron-masters. Ultimately the testator purchased the rights of Creelman in the premises, and continued the business on his own account, until the period of his death. At this time the whole feu was covered with buildings of one kind or another necessary for

the business, and in these buildings were blast furnaces, steam-engines, connecting railways, and much valuable machinery.

II. GOVAN COLLIERY.

This property consisted of an absolute right to the coal in the lands of Little Govan; a leasehold right to the surface of the lands, and an assignation to machinery and engines used for the purpose of a colliery. These different rights had originally been conveyed to a company of coal-masters, of which the testator was a partner, by a deed of disposition and assignation on which sasine was taken, and they were afterwards purchased from the company by the testator, who continued the business of a coal-master on the premises, until the period of his death, at which time there was also on these premises a variety of machinery, the testator having considerably added to what was upon them when he purchased from the company.

III. FASKINE.

This property consisted of an absolute right to the lands and Barony of Faskine, and of buildings, steam-engines, and machinery used for the purpose of a colliery in working the coals under the lands. The lands and the colliery had been originally purchased by a company of coal-masters, of whom the testator was one, and had been purchased from the company by the testator, who continued to work the colliery till his death.

IV. WILSONTOWN COAL AND IRON WORKS.

This property consisted of the absolute right to about 450 acres of very inferior land, and the buildings and machinery necessary for a coal and iron work. The works had been discontinued some time prior to the testator's purchase, and the working was not renewed by him in his lifetime.

V. LEGBRANNOCK COLLIERY.

The testator was tacksman of this colliery, under a lease

which bound him to take the machinery at a valuation, and entitled him at its termination to receive back the value, and any increase which he might have given to it.

VI. BALGROCHAN COAL AND LIME WORKS.

The testator held a lease of these works as the solvent partner of a company, consisting of himself and another, under the firm of the Balgrochan Mineral Company. The testator carried on the business until the period of his death, and at that time there were engines, machinery, utensils, and railroads upon the premises.

VII. GLASGOW FOUNDRY.

This property consisted of a piece of ground which the testator held under a feu right, and upon which he had erected the buildings and machinery necessary for an iron foundry, under the stipulations of a lease, which he had granted to the Glasgow foundry company, consisting of himself and two other individuals, his interest in the concern being in the proportion of four-ninths. One of the conditions of the lease was, that the company should pay the testator interest on the cost of the works, and leave them in good order at the termination of the lease.

The appellants in a condescendence, stated the different items of which the testator's estate consisted, and founded upon entries in the testator's books, as showing his opinion of the nature of the different parts of his estate, whether as being real or personal, and they pleaded in law:—

I. The trade or employment of manufacturing iron or lime and of digging coals to be used in these manufactories or for sale, or in other words the trade of a coal-master, or iron-master, or lime-worker, is of a personal nature, and all instruments, engines and utensils, whether fixed or loose, which are necessary and subservient to such a trade, are legally to be held and treated as personal or moveable effects or personalty.

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II. Instruments, engines and utensils which, taken either in part or in gross, are moveable before they are placed in a particular spot, do not lose their moveable or personal character though affixed to an heritable subject, unless they be so affixed *perpetui usus gratia* in contradistinction to trade, such as the windows of a mansion-house, &c.

III. The fund *in medio*, out of which legitim is payable, consists of the whole moveable or personal estate as before described that belonged to the deceased Mr. Dixon.

The respondent on the other hand gave a very long and minute enumeration of the different articles of machinery, and utensils which were upon the several premises, and pleaded in law:—That the articles upon which the appellant had condescended, did not form part of the testator's executry funds, but formed part of his heritable estate by destination, or by accession, or by being otherwise *pars tenementi*.

The Lord Ordinary, (*Moncrieff*,) remitted to Mr. Smith, of the Deanston Works, to report generally, and particularly on the nature, character, construction, position and uses of the machinery, and other subjects specified in the condescendence, and specially,

"(1.) Whether the steam-engines are so fixed to the ground "or building that they cannot be removed without great destruc "tion to the building, or without great destruction to the engine "themselves; and what is the practice at coal and iron works "similar to those of the deceased, as to the removal of such "engines and machinery?

"(2.) What is the comparative value of the engine, with all "its appurtenances, with reference to that of the building to "which it is attached?

"(3.) What would be the value of the engine removed "supposing that it can be removed without destruction, com "pared with the value of it as it stands in the premises, witho "reckoning the building?

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"(4.) Supposing that the building would be deteriorated by "the removal, to what extent would such deterioration go, sup- "posing that another engine of the same size and dimensions "were immediately obtained?

"These heads will necessarily embrace the expense of any "such operation.

"(5.) What is the state of the other subjects not making "proper parts of the steam-engine in respect of the four par- "ticular points above enumerated, or in any other points "whereby they appear to be more or less fixed to the premises, "or to the engines?

"(6.) How far the articles condescended on, which may "appear to be actually moveable, as not being at all attached to "the premises or the engines, are all or any of them essential "to the going of the works; how far, if taken away, their place "could be readily supplied by other articles of the same nature "and description; and how far they may or may not be of more "value where they are, or were at Mr. Dixon's death, than if "they had been sold or taken to another work of the same "kind?

"(7.) What is the practice, as between landlord and tenant, "of coal-fields, collieries, or iron works, with regard to the "removal of steam-engines and machinery at the end of a lease, "when such engines are of the description that belonged to the "deceased? How far is the landlord, in practice, held entitled "to retain, or the tenant to remove such engines, implements "and machinery, where no positive agreement has been made "on the subject?

"(8.) How far the different subjects referred to in the "preceding articles could be removed without being taken "asunder?"

Mr. Smith made an elaborate report descriptive of the different articles forming the subject of dispute. From this report it appeared that there were different steam-engines on the

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premises, viz., pumping-engines used for discharging the water from the mines—gig-engines used for raising the produce of the mines—blowing-engines for exciting combustion in the smelting furnaces—and tilt-engines for beating out bars of steel; that these engines were all more or less fixed to the soil, the necessary fulcrum or steam cylinder, the source of power, being obtained by its being either fixed with bolts and screws into large blocks of stone placed on the ground, or built into masses of stone or brick masonry; that there was a variety of machinery attached to these cylinders for accomplishing the objects desired; that the whole was enclosed with brick walls; that the building and mechanism formed *en masse* the engine or machine, each part being essential to the other or convenient for its due working; that pumping and blowing-engines were seldom moved, gig-engines frequently, but these engines might be moved without much inconvenience or destruction of their parts; that there was also a variety of unattached parts of the machinery, being duplicates of those which were attached to the engines, and a great variety of utensils used in the different operations not attached either to the soil or the machinery.

After giving minute description of the different articles to be reported on, Mr. Smith answered the special subjects of inquiry referred to him in the order in which they were put by the Lord Ordinary, and in these terms:—

"(1.) On this head the reporter has to state, that the whole "mechanism of the steam-engines can be removed without great "destruction to the buildings, and without great destruction to "the engines themselves.

"The expense of removal and re-erection has been already "stated in describing the different kinds of engines. On "reference to the preceding specific descriptions of steam-engines "given by the reporter, the Lord Ordinary will perceive that "the reporter considers the buildings to be essential parts of the "general structure of the engines. They are always erected

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"specially for such purpose, and they are seldom appropriated to "any other purpose when the mechanism has been removed.

"The practice at coal and iron works similar to those of the "deceased, is to remove the mechanism of the engines and other "machinery from one part of the premises to another as occasion "may require. The building or masonry is generally left, as in "most cases it would be unprofitable to remove it, and of course "it could not be removed without reducing it to the original "materials, and with considerable waste or destruction.

"(2.) The reporter has already, in describing the different "engines, stated the comparative values of the machinery and "buildings, and the same proportions are applicable to engines "of greater or less power than those specified.

"(3.) The value of the engine itself would not be materially "affected by its removal, excepting in so far as the cost of taking "down and re-erecting, which has been already estimated in "reference to the three classes of engines.

"(4.) There would be no appreciable deterioration of the "building, or of any of the occasional adjuncts, such as water-ponds "and the like, in the case here supposed, and there would be "no greater difficulty and expense in fitting another engine of "the same size and dimensions into the buildings than in the "erection of the original engine.

"(5.) Many of the other subjects referred to are distinctly "in themselves moveable, whilst others are more or less fixed "to the premises, the nature of which fixtures has been "specially noticed, in referring to the different articles con-"tained in the inventory.

"(6.) The articles condescended on, and already adverted to, "which are moveable in themselves, are all of them more or "less essential to the going of the different works. If taken "away their places could readily be supplied by other articles "of the same nature and description. It is usual to have spare "articles of most of the classes described about well-regulated

"works. They would be equally valuable if taken to any other "work where they were wanted.

"(7.) The general practice at coal and iron works similar to "those of the deceased is, for the tenant, in the event of the "termination of his lease, to remove the whole of such engines "and machinery, if not previously belonging to the landlord, "or specially acquired to him by the terms of the lease. And "in the event of the exhaustion of the mineral field or any "permanent bar arising to the profitable working of the "minerals, the whole of the engines and machinery are removed "by the tenant or worker of the field, or by the proprietor, if "his property, and the general premises dismantled as far as it "may be profitable to do so.

"(8.) In describing the different articles falling under the "preceding heads of special report, the reporter has so far "specified what articles are removable without being taken "asunder, and how far the others require to be taken asunder "before removal. In reference to the steam-engines, the "reporter may further state under this general head—That it is "usual, in removal, to separate the various parts just so far as "circumstances may require; for instance, in the case of a "steam-engine, the cylinder may either be removed in connec- "tion with its basement or bottom piece, or they may be sepa- "rated by undoing the joint, which, although it may strictly be "said in most cases to have formed a chemical union when the "lute is of iron borings, is still separable by skill and care, "without material injury to the parts. In a similar manner, "the various classes of pipes connected with the engines, pumps, "&c., are frequently jointed together with a lute of iron borings, "or what is technically called '*rust joint*.' Still, such joinings "are usually separated when the pipes are to be removed; and "when the operation is performed with skill and care, there is "no material injury to the parts, and, except by accident, no "destruction of the pipes."

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The report was wound up by this general observation: "In "their general character, the whole of the subjects may be "classed as the stock in trade of the late William Dixon, as a "coal and iron-master. But an objection having been taken by "one of the parties, at a meeting held after the draft of this "report had been communicated to them, to the insertion of "any remark bearing on the question of stock in trade, the "reporter feels called upon to state, that he makes the above "observation, because he conceives it necessary to exhaust the "terms of the remit made to him, and at the same time to "record the objection taken to the competency of introducing "it."

The Lord Ordinary ordered cases by the parties and upon advising these papers made avizandum to the court. The Court directed the papers to be laid before the other Judges for their opinion. - *Lord Cockburn*, one of the consulted Judges, prepared an opinion in these terms:

"The property of the deceased was left by him in different "situations, and this presents different cases for our considera- "tion. But there is one of these which very nearly supersedes "all the rest.

"This is the case in which the machinery was erected by "him upon land belonging absolutely to himself, and in his own "personal occupancy.

"The material facts as to all the premises in this situation "are these:—The deceased himself—a fee-simple proprietor— "erected the engines, the principal parts of which were fixed, "though not absolutely immoveably, to the land; and the soil "was not given as a mere *station* for machinery, with which it "was not connected otherwise. The engines were set up and "employed solely for the use, and the necessary use, of the "landed property, or feudal estate upon which they were placed. "There was no engine erected, except for the production and "manufacture of the minerals, which formed the most valu-

"able part of the property. And the present dispute has not "arisen between the proprietor of the machinery and strangers, "but between different members of his own family. The value "of the machinery is not lost to him, or to his friends, by the "case being decided either one way or other. It will continue "to form a part of his succession, according to any view that "may be taken of the present claims.

"Now, in reference to such a case, I am of opinion that "these machines, and these parts of machines, are heritable, "which are attached, either directly, or indirectly by being "joined to what is attached to the ground for the uses of the "minerals; though they may only be fixed in such a manner as "to be capable of being removed, either in their entire state or "after being taken to pieces, without material injury; and "under this principle I include those loose articles, which, "though not physically attached to the fixed engines, are yet "necessary for their working, provided they be so constructed "and fitted as to form parts of this particular machinery, and "not to be equally capable of being applied, in their existing "state, to any other engines of the kind.

"In considering this subject, I entirely disregard the view "said to have been formed upon it by the deceased himself. "His opinion of the law is clearly immaterial; for no man can "make his property real or personal by merely thinking it so. "And I do not conceive this to be a question which depends "even upon his intention; and if it did, the fact of his inten- "tion, which is liable to be deduced from innumerable circum- "stances, is not put to us as a matter of evidence. If I were "obliged to give any opinion upon this merely from what is "now before the Court, I should say, that as the entries in his "books include subjects clearly heritable, (houses for instance) "as part of his stock in trade, this shows either that he knew "nothing of the legal qualities of real, as distinguished from "those of personal, property; or that he had no idea that

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"Whatever formed part of his mercantile stock, necessarily lost "its real character from that single circumstance. But his "views on these subjects are irrelevant and unimportant.

"The general legal rule is so rudimental,—being merely "that land and its immediate fixed adjuncts, is heritable,—that "it seems idle to seek for formal authority in support of it. "Nevertheless it is laid down, in a few simple maxims, with "great clearness and rare unanimity, by all our writers. Indeed "it is not so much on the general principle that even the parties "differ, as on some supposed modern modifications of it. I do "not see that even the executors impugn the general proposition, "that what is physically annexed to the soil for the soil's use, "is heritable. They cannot.

"*Solo inedificatum, solo cedit,* is the legal maxim; and it "nearly solves the whole case. But Heinneccius brings it more "within the facts of this question, when he says that the civil "law declares those things to be heritable, '*quæ vel salvæ* "'*moveri nequeunt, vel, usus perpetui causa, junguntur immo-*"'*bilibus, aut horum usui destinantur.*' Lord Stair's descrip-"tion of heritables is, that they are those things 'which, "'though they *may possibly* be moved, yet it is *not their use* to "'be so.' And he adds, that 'positive law for common benefit "'constituteth property by the *necessary conjunction in con-*"'*structure.*' And Erskine's statement is, that 'things by their "'own nature moveable, may become immoveable by their be-"'coming fixed or *united* to an immoveable subject, *for its per-*"'*petual use.*' These principles are adopted so unanimously, "and so nearly in the same words, by all our authorities that it "is needless to quote more of them. There is no adverse "doctrine in our law; and Dirleton indicates his concurrence "by asking, 'whether the heir, who has right to a going coal, "'will have right to buckets, chains, and other instruments as "'being *accessione* and *destinatione*, addicted to the coal?' "Which Sir James Stewart answers by saying, 'the heir has

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" ' right to a going coal; and so the *buckets, chains, and all* " ' *other accessory instruments*, will belong to him, and not to " ' the executors.'

" We are not so rich in cases upon this subject as our " southern neighbours are. This is not so much owing, how- " ever, to our paucity of manufactories; for we have long had " quite enough of these to bring out such a question as this; " but apparently because the legal rule has either been more " clear, or more steadily adhered to. Indeed there are two or " three decisions which, though they have not the apparent im- " portance that attaches to questions involving great establish- " ments, are equally conclusive in law.

" There are three cases founded on by the heir, to which I " do not think that much, if any, weight can be attached. These " are Arkwright (3d December, 1819), Niven (6th March, 1823), " and Cox (1st June, 1833.) Arkwright's case was explained " by the Court, in the subsequent one of Niven, to have no " application to the principles now at issue. Niven's is equivocal; " partly because it related to what was covered by an heritable " security, which is generally understood to be taken on reliance " upon the actual state of the premises, and partly because the " Court went chiefly on the degree of injury that would be done " to the machinery by moving it; and it is not easy to appre- " ciate the different degrees of such injury in cases nearly " approaching. In the case of Cox, the purchaser of the real " property prevailed against the seller's creditors in a competi- " tion for the machinery; but then he had bought not merely " the land but the manufactory and its appurtenances. None " of these cases, moreover, occurred purely between heir and " executor.

" But in substance the case of Johnston (25th February, " 1783) did; and it was there found that certain materials, such " as doors and windows, were heritable; not because they had " been already incorporated with a house that was building, but

"merely because they had been laid upon the ground in order to "be so. Can it be said that these materials were more con- "nected with the real property, either in point of fact or of "destination, than the built and fixed machinery of a coal or "an iron work, wrought by the owner of the soil for the purpose "of extracting his own minerals?

"The case of Gordon, (2nd December, 1806,) is another "example. The plants in a *sale* nursery were there found to "be personal property, because they were intended to be "removed for the market. But Baron Hume states it as "having been laid down by the Court, that the very same "plants would have been heritable if they had only been meant "to be removed for the service of an estate, of which the "nursery formed a part. This discloses the operation of the "principle, that things otherwise personal become real by being "attached to land for its own use.

"So far was this carried, that, in the case of Bain (13th "November, 1821) it was found that the *bell* of a manufactory "was heritable.

"There is no contradictory Scotch case that I am aware of. "Indeed there are three elements, the combination of which is "conclusive on every such question. These are, *fixture, des-* "*tination, and convenience for the use of the land.* There may "be articles to which one, or possibly two, of these may apply, "without their losing their character of personalty. In the "case of a telescope, mere fixture to a building that contained "it, was found not sufficient to make it heritable, because it "was plain that the building was a mere accessory of the "instrument. But I know of nothing of which it can be said, "*first*, that it is fixed, directly or indirectly, to land; *secondly*, "that it is destined; and *lastly*, that it is necessary, or even "highly convenient, for the proper use of that land, of which "it must not be said that that thing is real. The whole three "are united here.

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" There can be no simpler or more conclusive exampl
" the ordinary case of a common agricultural mill. Ho
" an engine is to be disposed of in questions between cr
" —or between landlord and tenant,—or in construing
" —or when it was erected and used by a mere trading
" without any particular reference to the farm on w
" happens to be placed,—is not the question now bef
" where we are dealing between heir and executor, and
" adjusting the succession of a landowner, who had
" machinery for the use of his own estate. Nobody can
" that in such a case the fixed parts at least of an agric
" mill will go to the heir. This was expressly decided
" case of Hyslop (18th January, 1811); and thou
" Lord Ordinary in that case had found that the
" machinery was moveable, the Court had no opportu
" giving its opinion upon this point; and I conceive it n
" to admit of doubt, that an heir, upon his succes
" entitled to such a mill, and to all its appurtenances.
" be said, that though he succeeds to the well of the
" he must take it without the pipe or handle, becaus
" being physically removable, must go to the executo
" must the heir in a salmon fishery forego the poles t
" fixed at the mouth of a river for stake-nets, and the
" sluices, and other apparatus necessary for cruives o
" because these can be safely taken down by the same sk
" put them up? It humbly appears to me, that the simi
" of a common corn-mill, whether acting by steam, w
" wind, as to the heritable character of which I cannot
" tain the slightest doubt, settles this case.

" Accordingly, the executors almost admit that the
" *principle* is against them; and their claim really r
" certain circumstances or considerations, by which they
" the correct legal rule has been relaxed.

" *First*, It is said that Mr. Smith's report proves t

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"articles in question *can all be separated* from the land, without "much injury, and certainly without destruction.

"If the case were to depend upon the *degree* of force, or of "injury, implied in the removal, I would rather be inclined to "think that, as explained by the reporter, it was sufficiently "great to give the machinery in question more of a real than "of a personal character. But I cannot think that much turns "upon this. All that is wanted, is, to get them fixed to the "land. Not fixed indissolubly, but in such a manner as to "denote that they were meant to be connected with, and to "serve the uses of, the property. For I agree with Professor "Bell, that 'it is not mere *physical annexation* which alone "'deserves to be considered in such questions. That sort of "'annexation which depends on the principle of *accession* is "'frequently as strong a bond of connection as the mortar or "'iron by which a fixture is attached.' There is probably no "engine, however ponderous, which may not be so constructed "as to be capable of being moved without material injury. It is "more than probable that even a house, large enough to be "unquestionably heritable, may be so framed. The mere pos-"sibility, or even facility, of removal, certainly does not decide "the question. What are more removable than the doors and "windows of a house? Still there is fixture enough to let the "other principles of destination, and of convenience for the "enjoyment of land, operate. It appears to me, that the con-"servatory in a proprietor's garden, though it could be taken "away and put down elsewhere, with the most perfect ease, "in a couple of days; or even a garden seat, sunk a foot in "the earth;—a wooden bridge laid across a brook,—a wooden "porch over the door, though only attached by a single nail,—"or a verandah hanging from a hook outside of a window,—"though all capable of being lifted up and taken away, without "the slightest injury, almost by a single hand, all descend to "the heir.

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" *Second.* It is stated, and I think truly, that the machin
" in question formed part of what is called Mr. Dixon's *stc*
" *in trade;* and this single fact seems to be considered
" decisive of their being personalty.

" In the ordinary case, the rights and substances of whi
" we see the stock of a person's trade composed, are not on
" personal in law, but actually moveable; and hence, as soc
" as we hear the phrase *stock in trade,* the idea of such artic
" occurs to us. But we must not be misled by the sound
" these words, or by the habit of understanding them to deno
" a limited class of objects. There is nothing in law to preve
" *real* property from forming part of a stock in trade. Nothi
" is more certain than that it often does so. The decea
" plainly, and justly, held not only certain houses, but t
" whole coal and other minerals in his lands, to be part of h
" mercantile stock; and he probably considered heritab
" bonds, and many other unquestionably real subjects, in t
" same light. If the case could be made to depend upon th
" mere understanding or wish of the deceased, and the fact
" his putting the *ipsum corpus* of his landed estate into trad
" were to be used only as evidence of his intention, this wou
" form a different ground of argument altogether. But it
" one which it is needless for me to consider; because I hold
" to be clear, that the legal character of property cannot
" made to depend upon the mere opinion or wishes of t
" owner. If the deceased believed or desired, that, in arrangi
" his succession, everything he had in trade should go to h
" executors, he ought to have known that this effect could n
" follow from his mere understanding. If it did, the sa
" effect must follow in all other cases; and what would be t
" result, if it were announced, that all the heritable prope
" that is now traded with in Scotland, is henceforth to be co
" sidered as personal? Few companies or families could sta
" it. Family estates, where their principal value happened

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" consist of minerals, which the last proprietor chose to use for " the purposes of trade, (a very common case,) would disappear " by a division among executors.

" It is most important, however, to remark, that the notion " that all stock in trade is personal, is correct only with regard " to the stock of *trading companies*, and to the rules accord- " ing to which the interest of deceasing partners in such stock " shall go to their successors. Where the company continues " notwithstanding such decease, the interest of the representa- " tives of the dead partner resolves into a *personal claim* upon " the company for the value of his share or interest in the " concern, and this of course belongs to his executors; " although part of the company's stock may consist of coal, " buildings, landed estate, or any other subject unquestion- " ably heritable in its own nature. But the principle of this " rule has no application whatever to the case of a single in- " dividual making use of his own coal, iron-stone, building, " machinery, for the purposes of trade; and ought to have as " little effect on his succession.

" *Third.* A great deal is urged about the *favour that is due* " *to trade.* This indeed is the main foundation of the executors' " claim: and its essence resolves into this, that, in reference " to commerce, the strict rule of law has become inconvenient " and must be changed.

" I agree with Lord Ellenborough, who is reported to have " said, in the case of Elwes *v.* Maw, (when speaking of the " alleged danger of a legal doctrine,) that the 'danger or pro- " 'bable mischief *is not properly a consideration for a Court of* " *'law*, as whether the adoption of such a doctrine would be an " 'innovation at all.' If a clear legal rule has become inex- " pedient, it is the business of the legislature to alter it; and " a Court is not entitled to supersede Parliament by a succes- " sion of gradually encroaching judgments. But where is the " necessity for this favour, in such a case as the present?

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"This is a case touching the *succession of a landlord* who "chose to trade with the materials of *his own estate*. The only "erections for which peculiar protection can be sought, as is "exemplified by the whole of the English decisions referred to, "are those in which, without this protection, the value of the "outlay might otherwise be lost to the party who made it. "*Tenants* must be encouraged to improve their agricultural "establishments, by being assured that these establishments do "not necessarily accrue to the landlord at the end of their leases. "*Mere manufacturers* may require to be protected in investing "their capital in machinery, by being allowed to remove it "though it has been fixed for a time on another man's land. "Persons who, though proprietors of estates, hold them "only by a *limited title*, may require to be secured in "their outlay by its produce not being taken away from "them, or from their families, by distant and stranger heirs. "And *creditors* who have lent money upon the faith of "what they were entitled to believe heritable, may some- "times ask the rigid rule, which might impair their security, "to be softened.

"*We have no such case here.* Nobody is proposing to take "anything from the deceased or from his succession. He is to "get the full benefit of every sixpence of his outlay. The only "question is, whether part of what he laid out his money upon, "is to go to one of his children or to others? He might have "settled this as he chose. But if a proprietor will not settle "such a matter, is there any public policy that recommends "the mitigation of a legal rule merely to accomplish that "division among his family which he himself was not at the "trouble to arrange? And, besides, can it be laid down, with "sufficient generality to be the foundation of a judicial innova- "tion, that *de facto* it would be favourable to trade that its "machinery should go to executors rather than to heirs? Or "can it be said that the rule is to be adhered to, or to be

"departed from, according to the accident of a defunct pro-
"prietor having been in trade, or not having been in it?

"Take a case. If a gentleman with an estate chooses to
"raise and manufacture his own minerals, on his own ground,
"by his own machinery, and trades in their disposal, it is sup-
"posed that, on public grounds, he requires to be encouraged
"to do all this; and that the encouragement should consist in
"machinery, provided it be physically removable, descending
"after his death to his executors. Now, let it be supposed
"that the same individual, instead of doing all this himself,
"merely erects the machinery, and then lets it and the minerals
"to a tenant, and that he himself never trades at all. There
"is no pretence of any favour to him in this last case, because
"he is in no respect a manufacturer or a merchant. If en-
"couragement be sought for him, merely *as the layer out of the*
"*money* by which the machinery was produced, that is not the
"point under consideration. What the executors urge, and
"what the English cases they refer to seem to sanction, is a
"peculiar protection necessary *for trade*. Now I know no
"ground whatever, on which it can be maintained, that the rule
"as to real or personal can, in a question of succession, be
"different in these two cases. But according to the executors
"it must. Whenever a person is in trade, their argument
"treats him as a trader *merely*. Whereas, according to my
"notion of the law, when this person happens also to be a
"landowner, and trades by selling the produce of his own
"estate, he is to be considered exactly as an owner would be
"who trades in the cattle, the clay, the corn, or anything else
"that is upon the surface.

"And is there no favour due to landowners who are not
"traders? The doctrine of the executors implies that, whenever
"a proprietor dies, his property is to be plucked bare by his
"personal heirs, who are entitled to remove every article that
"is removable without material injury. His agricultural machi-

" nery, in particular, must be torn from the ground. At le
" I cannot see upon what principle a grinding or thrashing-n
" can be saved, if it be true that a coal-engine must be sac
" ficed. They are both equally for the use of the owner's o
" land. A water-wheel for draining a meadow must share
" same fate. It is used solely for behoof of the land; l
" because it is only suspended by an axle across an insignific
" bit of wall, and is easily removable without being taken
" pieces or injured, it must be lifted and sold on the access
" of every new heir. The same thing must happen to vari
" other engines and apparatus usual and necessary for the u
" of real property. Some estates are of no value, except
" working out their actual substance, for which fixed machin
" is as indispensable as ploughs are to an arable farm. W
" is a property, consisting of lime, or stone, or clay, or f
" without the appropriate engines? To favour executors,
" letting them take these away at every death, is just to fav
" them by giving them the estate; or at least by such a sacri
" of the heir's interests, that no heir in possession could a
" his capital in such works.

" *Fourth*, A good deal is founded upon the alleged *usage*
" the country as to removing such engines.

" Now, in the *first* place, the fact of there being any su
" usage, *as applicable to the case now before us*, is not prove
" The reporter says, 'that the practice at coal and iron work
" ' similar to those of the deceased, is to remove the mechanis
" ' of the engine and other machinery *from one part of t*
" ' *premises to another*, as occasion may require.' And he aft
" wards states, that the practice is 'for the *tenant*, in the eve
" ' of the termination of his lease, to remove the whole of su
" ' engines and machinery, if not previously belonging to t
" ' landlord.' And then he mentions, (which was almost nec
" less,) ' that, in the event of the exhaustion of the mineral fie
" ' or any permanent bar arising from the profitable working

"'the minerals, the whole of the engines aad machinery are "'removed by the *tenant or worker* of the field, *or by the* "'*proprietor*, if his property, and the general premises dismantled, as far as it may be profitable to do so.' This is all very likely, and very sensible; but it does not touch the present case. The question here arises from a claim by executors to dismantle a coal or iron work which they did *not* erect; of which they *never* were the tenants; where there is no lease at all; and where the minerals, for which the engines were put up, is *not* exhausted, but on the contrary, is wished to be wrought still farther by the heir. The report establishes the fact, that the machinery is removable, and is frequently removed; and I concede this. But the executors seem to refer to usage for a different purpose, namely, to show that, in practice, these structures are taken down and disposed of, not only on the minerals being exhausted, or on the termination of leases, but at *the termination of landlords' lives*, in order that executors may get their value. It is this that is not proved.

"Indeed, except for the sake of showing the practicability of removing such things, I do not see the relevancy of usage in this discussion. It might be an evidence of probable intention, if the case turned upon intention. But though it could be shown that all merchants were in the practice of dealing with heritable bonds very much as if they were personal, this would not alter the legal character of these instruments in a question of succession.

"I conceive, therefore, that all these considerations are irrelevant or immaterial, and that the ordinary legal rule must be given effect to, so long as the legislature permits it to last.

"The executors have made their strongest appeal to the law of England. But were it not that they have so urged that law upon us, that we might seem not to have done justice to their case unless we considered it, I should not venture to

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" say a word about it. Not because it is the law of a foreig
" country, and not because we must hesitate before we reco
" nize judgments, by which Mr. Amos, in what the Chie
" Justice on Bankruptcy describes as 'his able Treatise o
" 'Fixtures,' states, that the *Courts* have 'from time to tim
" 'introduced exceptions of so extensive a nature as almost t
" 'have *subverted* the general rule;' but because those n
" trained to the practice of a foreign system can never be su
" that they understand either its principles or its terms.
" venture to speak of the English cases, therefore, with th
" utmost respect and the utmost diffidence; and permit myse
" to do so, only because I have scarcely more than a sing
" remark to hazard upon such of them as have been presse
" upon us.

" This remark is, that, with one exception, not one of the
" applies, except in some incidental observations by the Cour
" to the particular case now before us.

" Thus, Elwes *v.* Maw was a case about the right of a
" *agricultural tenant* to remove buildings which he had erecte
" upon the farm.

" It is immaterial here how such a claim was disposed o
" because it is inapplicable to the matter before us. But I a
" struck with the observation of Lord Ellenborough, who,
" delivering judgment, classifies the cases; and after describi
" one of them as arising 'between *different descriptions of*
" '*presentatives of the same owner of the inheritance*, vi
" 'between his heir and executor,' states, that 'in the first cas
" '*i. e., between heir and executor, the rule obtains with t*
" '*utmost rigour in favour of the whole inheritance*, and again
" 'the right to disannex therefrom, and to consider as person
" 'chattle, anything which has been affixed thereto.'

" In Lawton *v.* Lawton the point was, whether a fire-engin
" set up for the benefit of a colliery by *a tenant for life* shoul
" go to his executors, or to a *remainder-man*. This is not th

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"case here. Something like it, so far as I understand the "English terms, may possibly occur when a claim shall arise "between the executors of a taillied proprietor and the next "heir of entail, a stranger to the family of his predecessor, who "erected the machinery. But here also, as I read the report, "the case now before us is expressly saved. Lord Hardwick "distinctly states, that 'this is *not* a case *between an ancestor* "*and an heir.*' 'Tenants for life would be discouraged in "erecting their machines, if they must go from *their repre-* "*sentatives to a remote remainder-man.*'

"Lord Dudley *v.* Lord Ward was the very same case as the "last, except that the erections were made by a tenant in tail, "instead of a tenant for life. But Lord Hardwick states this "was immaterial,—'In the reason of the thing there is no "material difference; the determinations have been from con- "sideration of the benefit of trade.' And the extent of the "benefit given is thus described,—'Suppose a man of indifferent "health, he would not erect such an engine at a vast expense "unless it would *go to his family.*' There is no preference of "one part of the family to another.

"The point in Trappes *v.* Fielding's assignees is thus stated "by Lord Lyndhurst,—'The question was, whether the ma- "chinery, the subject of the present action, passed to the *mort-* "*gagee by a mortgage deed* granted by the bankrupts before "their bankruptcy, or whether it became the property of the "assignees under the commission?' This being the question, "it is needless to say more about it in reference to the present "case. It was full of specialties; it in particular was not "between heir and executor; and it depended very much upon "the terms and meaning of a deed. The result was, that "'under all these circumstances, it appears to us that there is "'sufficient to satisfy *the terms of the mortgage deed*, without "'including the machinery in question, and that it neither "'passes, nor was *intended* to pass by that deed.'

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" It is in disposing of this case that his Lordship uses words
" which have been supposed to indicate an opinion, that in Eng-
" land the present case, though between heir and executor, would
" be viewed favourably for the latter. But I do not think this
" is what is meant. He says, 'these authorities lead us to the
" 'conclusion, that where utensils and machinery are erected
" 'by the owner *for the purpose of trade only*, in a neighbour-
" 'hood where such utensils and machinery as these *would com-*
" '*monly have been removed*, and when this can be done *without*
" '*injury to the inheritance*, they form an exception to the
" 'general rule, and are not to be taken as a part of the inhe-
" 'ritance, but as personal estate.' As I understand this pas-
" sage, his Lordship is not speaking of the case of a landlord
" erecting machinery *for the necessary use of the estate*. He is
" speaking of erections made, though by an owner on his own
" land, '*for the purpose of trade merely*,' *i. e.*, of trade not con-
" nected with the land; of trade for the use of which a portion
" of his land is given for a mere *site*. Hence the removal
" must be *without injury to the inheritance*. Can an inhe-
" ritance, consisting of coal or ironstone, fail to be injured by the
" removal of the machinery without which its produce cannot
" be obtained?

" In Loyd *v.* Wallmslay the point seems to have been
" whether a company which had erected machinery *as tenants*
" had a right to remove it. This being the nature of the case
" the result for our present purpose is immaterial. But it is
" remarkable that the same feeling in favour of the heir, and the
" same reservation of any case between him and an executor
" that occurs in all the other cases, is disclosed by the Chief
" Justice in Bankruptcy,—'Where any fixture is annexed *by*
" '*the tenant*, it does not necessarily become a part of the free-
" 'hold, but its character as realty or personalty depends on the
" 'nature of the fixture, and the purpose for which it was
" 'annexed.' But 'where the annexation is made by the owner

" ' of the freehold, the fixtures become, without reference to the " ' nature of the fixtures, or the purpose for which they were " ' annexed, a part of the freehold itself, and as such descend to " ' the heir.'

" In Lawton *v.* Salmon the question did arise between exe- " cutor and heir, and it is the only one of these cases in which " it did so arise. It was an action brought by an executor " against an heir, or which was the same thing, against the " tenant of an heir, to recover the value of certain salt-pans used " in a salt-work. The facts were, 'that these pans were made " ' of hammered iron, and rivetted together; that they were " ' brought in pieces, and might again be removed in pieces; " ' that they were not joined to the walls, but were fixed with " ' mortar to a brick floor.' It was decided that these vessels " belonged to the heir. Lord Mansfield, in delivering judg- " ment, mentions the favour that had sometimes been shown to " tenants for life or in tail as against remainder men, and then " says, '*but I cannot find that between heir and executor there* " ' *has been any relaxation* of the sort, except in the case of the " ' cider-mill, which is not printed at large. The present case " ' is very strong. A salt spring is a valuable inheritance; but " ' *no profit arises from it unless there is a salt-work,* which con- " ' sists of a building for the purpose of containing the pans, " ' &c., *which are fixed to the ground. The inheritance cannot* " ' *be enjoyed without them.* They are accessories necessary for " ' the enjoyment and use of the principal.' It is not easy to " add weight to the authority of Lord Mansfield; but these " words are quoted with approbation by Lord Lyndhurst in " deciding the case of Trappes. So that, notwithstanding " modern relaxations, the rule, as between heir and executor, has " descended unimpaired from Lord Mansfield's time to the " present day.

" I therefore see nothing in these English authorities that " ought to make us hesitate in applying what I conceive to be

" the clear rule of our own law. And I have already stated
" that I conceive that this rule not only assigns to the heir th
" larger and the fixed machines, but such smaller articles, a
" though not physically attached to these greater machines, o
" capable from their use of being so, *form parts of the genera*
" *apparatus*, provided they be so fitted and constructed as t
" belong specially to this particular machinery, and not to b
" equally suited for any other. I can give no catalogue of th
" precise articles which this principle reaches; because neithe
" as to these, nor even as to the heavier parts, does the ver
" distinct report by Mr. Smith instruct my ignorance of thes
" matters, as to the nature and uses of all that he describes;
" can only very humbly attempt to suggest the rule. But I ma
" explain what I mean by a homely example. A kitchen grat
" or any other grate built into the wall of a house is a fixtur
" But the poker and the tongs are not, because they are no
" only naturally moveable, but, (except in taste,) will suit an
" other grates, as these grates may be equally well supplied b
" other tongs and other pokers. The key of a door, on th
" other hand, though moveable *sua natura*, is a fixture, becau
" it alone is fitted for the use of the particular lock.

" It is scarcely necessary to notice the other positions of t
" deceased's property.

" One of them was, that he was the owner of a piece
" ground, on which he first erected a foundry, and then let th
" ground and foundry together to a tenant upon a lease curren
" at his death. In principle this is the same with the last case
" He attached the foundry to the soil for the necessary use o
" the land; and the machinery is heritable, whether he himself
" traded with it, or merely took a rent and let his tenant trade.

" A third situation was, where he himself was only the
" tenant, and had the use of machinery belonging to his land-
" lord. Since the machinery was not his, I do not see how the
" case comes into the present question as to his succession at all

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"If the lease goes to his heir, of course so, in such a case, does "the right to use the machinery.

"The last case is, where the deceased, though only tenant, "had erected the machinery. We are scarcely in a situation to "determine the result of this, because we do not know whether "his agreement with his landlord entitled him to remove the "machinery at the end of the lease or not. If it did, then, as "the purpose for which it was erected will be served, and its "connection with the land will be ended with the lease, so far "as I can at present see, that machinery will ultimately belong "to his executors."

This opinion was concurred in generally by all the consulted Judges except as to the law indicated in the last paragraph. In regard to this two of the Judges, the *Lord President Boyle* and *Lord Murray*, expressed doubts, while *Lords Cuninghame, Gillies*, and *Fullerton* expressly dissented, holding that in the case put the machinery would belong to the heir and not to the executor of the tenant.

When the cause came to be advised upon the opinions of the consulted Judges, *Lords Meadowbank* and *Medwyn* concurred in these opinions, while *Lord Moncrieff* and the *Lord Justice Clerk* dissented.

*Lord Moncrieff* delivered his opinion in these terms:—

"I had occasion to give a great deal of attention to this "case, in the preparation of it, and had the advantage of hearing it very fully argued *viva voce* before me. I considered it "as a case of very great importance, and one in which a great "deal of discrimination was necessary. I still regard it in the "same light; although I must confess, that, if the leading "views adopted by the consulted Judges, by which the cause "must be decided, and by which, as I understand the opinions, "*all*, or very nearly *all*, the subjects embraced in the condescendence, are to be accounted heritable, (a result which "certainly did not enter into my comtemplation,) are sanc-

" tioned by principle and authority, all the anxious investigation
" which has taken place must appear to have been in a great mea-
" sure unnecessary. For, if the mere fact of the material, engines
" and apparatus, in all or any of the establishments alike, being
" in any manner attached to the land on which they were
" placed, or connected with it, were regarded as sufficient to
" solve the whole case, I should have thought the facts admitted
" on the record might probably have been sufficient for leading
" to that result, without any inquiry whatever. I considered
" the case in a different light; and I should probably have sent
" it to a jury, if it had not occurred, that, with the consent of the
" parties, a more satisfactory adjustment of the facts might be
" obtained by the report of a person of skill, to stand as a
" *special case* for the trial of the questions of law, according
" to the course followed in the latest English case on the same
" subject. The report of Mr. Smith has appeared to me to be
" distinguished by great clearness and precision, marking it
" as the work of a man thoroughly master of the subject, on
" whose statements the Court may entirely rely. It was ac-
" quiesced in by the parties, and finally approved of by judg-
" ment of the Lord Ordinary, June 26, 1839. I hold it
" therefore, to be conclusive between these parties on all the
" matters of fact on which the case depends, whether relating
" to the nature, construction and purposes of all the parts of
" the subjects and machinery in question, or to the practice
" of the trade in regard to them, or to the scientific or prac-
" tical inferences to be deduced as matter of fact; in everything
" that is, which a jury could have decided; and I must take
" the liberty of rejecting all reasonings which do not rest
" on the basis of the facts ascertained by it, or admitted on
" the record.

" Though I shall feel it to be my duty to deliver very full
" my own opinion on the merits of this case, which I cannot
" but regard as of very vital importance both to the law and

"' the trade of this country, I am aware that the opinions of the "' consulted Judges must rule the judgment to be pronounced. "' But before going farther, I beg leave, with all deference, to "' observe, that I do not see very clearly the definite result to "' which those opinions lead, and that I apprehend this Court "' will find itself under very considerable embarrassment in "' attempting to frame a precise interlocutor in respect of them. " For myself, I must say, that though I have tried to fix it, I " really do not at present know what the interlocutor ought to " be, to satisfy the opinions of the majority of the Judges. " The leading opinion is, in the whole general reasoning, " directed to one *single state* of the case, viz., that of machin- " ery placed on land, the exclusive property of Mr. Dixon, for " the *necessary use* of the *feudal estate*, and where 'there was "' no *engine erected, except for the production and manufac-* "' *ture of the minerals which formed the most valuable part* "' *of the property.*'" "This is applied with one only excep- " tion, which is slightly noticed in the end of the opinion, and " to which I must afterwards advert, to all the subjects held in "' property indiscriminately. But it proceeds on a mistake, in "' *fact*, in regard to the *Iron Works*, both at *Calder* and *Wilson-* "' *town*, as well as the *Glasgow Foundry*,—into which the Judges "' have been led by an incorrect statement in the case of Mr. "' Dixon, though it was corrected in the case for the claimant. "' And that the fact was otherwise, is clear upon the record. "' Very possibly, this might not alter the opinion of the Judges; "' but it is taken as an important element in the question, and "' a very great part of the reasoning is built on the assumption "' of it.

" Again, I do not know whether or to what extent the very "' numerous articles condescended on, which, according to the "' report, are *simply* or '*distinctly*' *moveable*—not being at all "' attached to any part of an heritable subject—are to be held " heritable in the present question. Sometimes it is so said in

"the opinion, but in other places a distinction is pointed. But "there is no attempt to apply any discriminating principle to "the specific articles reported on by Mr. Smith.

"There is, farther, an important difference of opinion on "the last point stated in Lord Cockburn's opinion. It is, I "believe, necessary to decide it; and I consider it as so impor- "tant, that, if Lord Cuninghame's opinion were to be adopted, "while it would in a great measure nullify the distinction by "which the force of the English cases is sought to be avoided, "it would, in my opinion, in effect, alter our own *undoubted* "law, in regard to the succession of the heir and next of kin "of every tenant of Scotland. I shall think it necessary to "request very particular attention to that point. But having "suggested these difficulties, in regard to the practical disposal "of the cause, I now turn to the consideration of the merits "of it.

"Throughout the case for the respondent, Mr. Dixon, and "in all the opinions, it is taken for granted, that the question "arises simply between the *heir* and the *executors* of the late "Mr. Dixon; an assumption which is found exceedingly useful "to the argument with reference to some of the judgments in "the English Courts. But the assumption is not correct; and "the indefinite use of the terms '*executors*' and '*executry*,' "leads to an important error in the foundations of the discus- "sion. The claim of Mrs. Fisher is not a claim as an *executor* "of her father, nor a claim on his *executry estate*, in the proper "sense. If it were, it would be excluded by his will, without "inquiry as to the nature of the subjects of property. Her "claim is for her *legitim* as a *creditor against* her father and his "*executors*,—a right which he had no power to disappoint by "any conveyance of personal estate either to his *heir* or to his "*executors*; and the *fund* of *legitim* is *not* part of the *executry*, "but perfectly distinct from it.

"This is not a mere distinction of *words*. There is deep

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"reality in it with reference to the present question. For that "question is not, whether the machinery and other articles in "controversy are to belong to the *heir* or to the *executor* of "*Mr. Dixon*, but whether, *in this special* case of a claim by a "child of the house for *legitim* as a *debt* ,those subjects are to "be held in law to be heritable or *moveable*. And when we see "that the ancient principle of *fixture*, on which the plea for "*heritable* is mainly rested, has so extensively yielded to the "more practical views of modern society, that, in questions "between *landlord* and *tenant*,—between the *executors* of a *life-*"*renter* and the *fiar*,—between the *executors* of a *proprietor* "*under entail* and the *heir of entail*, — between a *mortgagee*, "or holder of an heritable security, and the *assignees* or *credi-*"*tors* of a bankrupt,—between the *crown*, by writ of extent, "and its debtor or his other creditors,—it is held, and all but "conceded, that the very same articles, or a large proportion of "them, would be deemed to be *moveable* or *personal* estate; "and that almost the single case struggled for is the *simple* case "of *heir and executor* ?

"I am not here saying, that, if it *were* a question between "*heir and executor*, the articles, or any particular class of them, "must, in *all* such cases, be held to be heritable. I cannot "think so; and I believe I have the distinct authority of Lord "Lyndhurst for at least entertaining the greatest doubt of it. "But, attending to the distinctions under which the question "has been discussed, both here and in England, and to the way "in which it is treated in the present case, I think it of very "great importance, that the true character of that case should "be kept steadily in view.

"Proceeding on the idea of its being a question between "*heir* and *executor*, strong representations are made of possible "inconvenient results, if, on the death of a proprietor, his ex-"ecutors could always carry off the machinery and utensils "necessary for carrying on works established on the lands *for*

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" *securing the produce of it.* One answer to this is, that i
" assumes, as a principle of law, that whatever is essential to th
" cultivation and profitable enjoyment of an heritable estat
" must necessarily be *heritable* in succession,—a principle nc
" where recognized that I am aware of. What is the whol
" *stocking* of a common farm? The carts, wagons, plough
" harrows, fanners, horses, cows, spades, pick-axes, roller
" hammers, saws, the utensils of a great dairy, and innume
" able other articles, are all indispensable to the working of th
" land, whether by a tenant or by the proprietor himself, an
" often constitute a very large portion of his estate at his deat
" But is not such a stock, are not such articles personal c
" moveable in succession, which, if not otherwise regulated b
" deed or agreement, must fall to his *executors* or next of kin
" and may be all carried off or sold? And was it ever befo
" supposed, that because of the *inconvenience* which this migh
" occasion to the heir, in the necessity of replacing them b
" other articles of the same kind, they must be held to be her
" table, though truly *moveable* in their own nature? I belie
" that such a proposition never was maintained; though t
" undoubted law on the subject seems to have been lost sig
" of in some of the opinions on the case of a tenant dying durin
" a lease. It is evident that the question must be brought to
" very different test from this.

" But, before looking for such a test, can no strong case b
" stated the other way,—no case both of inconvenience and
" plain injustice resulting from the opposite principle? It wil
" come nearer the point, and afford a surer test of the fairness
" as well as the soundness of that principle, to suppose that
" man possessed of extensive real property held burgage, an
" of large personal funds, chooses to invest the *whole* of thos
" personal funds in the purchase of machinery and other article
" in their nature moveable, placed in some part of the heritabl
" subjects, for the purpose of carrying on a great trade there, a

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"in a cotton-mill, iron-work, or other such establishment, in "the expectation of realizing a large capital by the profits; and "that, while the work or the trade are going on, and all the "property so invested is reckoned by himself, and recorded in "his books, as his personal estate, he dies suddenly or unex- "pectedly, *intestate*, never having dreamt of the result which it "it is said the law has made for him, leaving a widow, one son, "and a numerous family of daughters. Or, though he had "personal funds reserved, his *personal debts*, contracted *in the* "*trade*, may be found to exhaust them all. Are we prepared to "hold, in reference to such a case, that the *whole* property, "whether by *fixture* to the ground or house, or by what is called "*destination*, even where there is no attachment, is heritable; "and that there is *no personal estate at all?* The widow can "get no *terce*, because the property is *burgage*; she can have no "*jus relictæ*, all being heritable; the daughters can have no "*legitim*, there being no *personalty* against which to make the "claim; and there can be no dead's part, or executry; the son "must take all as heritage, and the rest of the family must be "left to starve, or to the charity of their friends.

"If the argument of the respondent for the unbending rule "maintained be sound, such a result would be inevitable; and, "according to that argument, it would take place equally in "regard to *creditors*, like the widow and children for their *jus* "*relictæ* and *legitim*, as in the case of *gratuitous* next of kin. "It is the necessary effect of the moveable subjects having been "made heritable in the way alleged. And it is said, in order to "relieve the apparent evil of such results, that a man is bound "to know the law; that his understanding of it is irrelevant to "the question, and cannot alter it; and that if he has neglected "to provide against it, there is no help for the consequence. "This may be all true, *once it is settled what the law in the* "*special case is.* But in trying the question, *what the law is*, it "does not follow that the natural belief, or still more, the actual

" understanding of the party who so placed things in themselves " moveable, more especially of a party as *a debtor* for *jus relictæ* " and *legitim*, concerning the nature of such property, may not " be a most legitimate and relevant element in the inquiry. It " was so held in the English cases, and accords with sound prin- " ciple. And it is farther apparent, that the absurd and unjust " results to which the respondent's doctrine would lead, are at " least as relevant to the question as the possible inconveniences " attributed to the opposite principle.

" Having it in view, then, that this is the case of a *creditor* " claimant, and that such a result as I have represented must " be comprehended in the question, I come now to consider the " case on the facts ascertained, and the law as I understand it.

" All the articles specified in the condescendence and report " on which any question arises, are in their *original nature and* " *character moveable subjects*, manufactured, prepared, and pur- " chased as such, at a distance from the heritable property o[illegible] " which they were found placed at Mr. Dixon's death. Th[illegible] " question is, whether all or any of them, or what part of the[illegible], " had been *converted* from their condition of *moveable* or *person*[illegible] " estate into that of *real* or *heritable*. The respondent mu[illegible]st " show this.

" The plea for rendering all, or nearly all, of these herita[illegible]le " in law, is derived from two principles, either taken separat[illegible]y " or in combination, viz.,—1. *Fixture*, or *physical attachme*[illegible]*t*, " either to land itself, or to a house or building actually a[illegible]d " legally forming a part of such land as an heritable estate; a[illegible]d, " 2. *Destination*, as I understand it, by the act of the proprie[illegible]r, " in placing it in a particular situation in connection with h[illegible] *is* " operations in the locality of his heritable estate.

" I cannot help thinking that there is a great looseness [illegible]n " the manner in which those two principles are here almo[illegible]t " indiscriminately applied. And, with regard to the *last*, [illegible]n " particular, while it is evidently dependent, in regard to a gre[illegible]t

"many articles, on the primary effect to be given to the *first* "concerning *other* articles, I own I do not well understand what "is meant by *destination*, if the *purpose, intent*, or *understanding* "of the party, is altogether *irrelevant* to the question. I am of "opinion, that there *is* a principle of *destination* of very great "importance in the matter; but it is of a very different nature "from that founded on by the respondent; I mean the purpose "or object for which the machinery is placed on the land at all, "as being simply for trade, and the purpose for which any house "or building is placed there, as being simply in subserviency "to the use of the machinery. To this I shall presently return. "But, in the meantime, the view taken by the respondent "requires to be reduced to its elements before such a principle "of destination can be applied with any precision.

"In the argument, and in the opinions, the principle of "*fixture* is treated as the leading and conclusive point. It "necessarily must be so, in order to make out a case of herit- "able estate. For, if there were *no annexation at all* of *any- "thing* to the freehold, I should think that neither on principle "nor on authority would it be possible to allege that the pro- "perty was heritable. And yet, throughout the argument, "there is an anxious endeavour to mix the idea of destination "with that of fixture,—which is aided by the assumption of a "fact as indiscriminately applicable, which does not at all apply "to nearly one-half of the property.

"I. But, before I consider at all the effect of *such fixture* "as that which is reported in the present case, I wish to direct "attention to the very numerous and valuable articles here "condescended on, as to which it is ascertained by the report "or special case that *they*, in themselves, are *not all attached* "either to the land, or to any house, or any machinery that is "so attached. As to them, there is *no case of fixture* at all; "and they are expressly reported to be simply moveable "subjects.

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" Here is a large collection of articles at the different works " distinctly reported to be *in themselves moveable—not attached* " *to any fixed subjects,*—which can be removed without *any* de- " terioration, and a great proportion of them simply *unattached* " *implements of trade.* I ask whether *all* these are, notwith- " standing, to be held heritable subjects? The report cannot " be impeached *upon the facts;* and upon one and all of them " the *fact* reported, whatever the *law* may be, is that they are " actually in themselves moveable.

" If it be said that *some* of them may be in law moveable, " and others heritable, the consulted Judges have not instructed " us how we are to make the distinction. If I follow my " own views, I cannot distinguish one class from another, " except perhaps in one instance, and that depending on a " condition yet to be considered. And anything like a prin- " ciple indicated in the opinions is so exceedingly loose and " indefinite, that I should be in the greatest difficulty how to " apply it.

" But on what ground is it that things *moveable* in them- " selves, and which have *never changed their proper moveable* " *state,* are to be held heritable in a question like the present? " I understand the ground taken to be *destination,* because the " articles are necessary to the going of the *works* or the *trade.* " It is to be observed, however, that, though many of them are " stated to be essential to the working of the fixed machinery, a " large proportion are not of this description, but *only necessary* " *to the trade; e. g.* article 8 of condescendence.

" But when was it decided that mere *implements of trade* " are to be held heritable, simply because they are destined to " the purposes of a trade to be carried on in, or on, a particular " heritable subject? This cannot be held, even if the trade is " to arise from produce to be extracted from the soil. The " known case of *farm stocking* is a palpable example of the re- " verse. The carts and ploughs, &c., are as essential to the

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"raising and bringing to market of corn, and grass, and cattle, "and as directly destined or appropriated to that object when "placed on a farm, as the *moveable* apparatus and *implements of* "*trade* here in question can be said to be for the manufacture of "iron, or even the raising it from the earth. And yet these "were ever held to be personal estate, whether of a proprietor "or a tenant.

"It seems to me to be a misunderstanding of the principle, "by which things in themselves moveable may be rendered "heritable *destinatione*, to apply it to such a case. Moveable "rights or subjects may be made heritable *destinatione*, when "they are provided to the *heir* by marriage-contract, or other "deed within the granter's power. The same principle applies "also to bonds with a clause of *infeftment*, and bonds *secluding* "*executors*, though other considerations may also affect these "cases. And it seems also to have entered into the judgments "in some of the cases of *securities constituted by deeds* over "machinery. The case, however, which is pressed as affording "a direct analogy, is that which occurred in Johnston, February "25, 1783,—of a house in *progress* of *building*, and certain "window sashes or window frames, *prepared* and *on the ground*, "but not yet put up. The court refused to find that these "articles were parts of the building, and thereby heritable. "But they found that, being destined for the house, they fell to "the heir. That decision was pronounced with difficulty; and "it may well be doubted whether it would have been pro-"nounced in a case of *legitim*. But it appears to me, that "there is no principle involved in it which can have the least "application to the moveable articles here in question. The "distinction is to my mind plain and palpable. The window "frames were prepared and destined for a specific purpose of "being *incorporated* into a known heritable subject, a house in "progress of construction for permanency. If they had reached "the *end* of their destination, there would have been no ques-

" tion. But, being so decidedly destined for that end, it was " held that the heir must take them to fulfil it. The moveables " in question are very differently situated; they have *already* " reached their *final destination;* and they have *not been incor-* " *porated* in any heritable subject. They *never were destined* " to be *incorporated with* or *affixed* to any subject already in an " heritable state. They are there simply as *moveable* articles, or " *implements of trade,* destined to *remain in the same state,* unless " removed, whatever may have been the purposes which they " were fitted to serve. The case in this point forms a perfect " contrast to that of Johnston.

" But, it may be asked, how is the case of the moveable " articles in the *Wilsontown* inventory to be solved on this " principle? There was no ironstone mine there. The claimant " averred, that when Mr. Dixon purchased the premises and " machinery there, it was his purpose to dismantle the work " and remove all the articles. This *purpose* was denied. But " it is expressly *admitted* that '*he had never set the works agoing*.' " So, at his death, no machinery had ever been worked there " his possession. And how then had *he,* by an act of his own, " *destined* the *moveable* implements there lying to form part of " the heritable subjects? Destination to be removed and used " in *another* place, if not sold, would just prove them to be in " every sense moveable; and *non constat* that he ever meant " them to be used at all in that locality.

" Or the case may be put of a *mine exhausted,*—a colliery " where the coal is *worked out,* and the machinery and imple- " ments *remaining on the spot.* It is a case for testing the prin- " ciple on the *whole* question. But how would the *actual* " unattached *moveables* then stand? How would *they* be herit- " able *destinatione?*

" It is the more remarkable, that the claim to this part of " the property as personal estate should be resisted, because, in " the very latest case in this Court, Cox *v.* Stead, &c., June 1,

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"1833, the whole of the *small* machinery and utensils was held "to be personal estate; and the judgment of Lord Lyndhurst "in the case of *Trappes* is a direct decision to the same effect, "whatever may be the effect of it otherwise.

"*Finally*, If we are to go on *destination alone* as to these "articles, I do not see how the Court can refuse to look at the "actual meaning and understanding of the party, as it is proved "by the deeds of conveyance, and the distinct entries in his "own books. Most clear it is that *he* treated all the articles of "property in question *expressly* as constituting part of his *move-*"*able* estate. But, as this goes deep into the more important "question still to be considered, concerning the *fixed machinery*, "I shall not at present go into the particular facts. The *desti-*"*nation*, however, is clearly to *the trade*. *Query*.—What is the "situation of the engines and carriages on a *railway?* Are "*they* heritable *destinatione?* They are very *emphatically* "moveable; but yet they are for no use but as attached to the "fixed railway. Part of the very things here in question are "the same.

"But I am of opinion that, with the exception of one class "of articles which I have specified, all the articles in a simply "moveable state, as reported, must be held to be *personal* pro-"perty in the present question.

"2. The more important and interesting question is that "which relates to the steam-engines and larger machinery, or, "in general, that part of the articles condescended on which "are in one way or another affixed to the ground, or to stone "buildings erected on the ground.

"As far as I may be a competent judge, it does not appear "to me that this question has ever been fairly brought to trial, "either in England or Scotland, till the present moment. And, "although I am very sensible of the difficulties attending it, "I cannot, with all deference, help thinking, that it is far "too narrow a view of the subject, to hold it as at once resolved

" by the old notions about *fixtures*, having reference to things " of a totally different nature, or to quote such cases as that of " the bell of a manufactory, or any similar article, as furnishing " anything like a safe principle of judgment. The steam-engine " is entirely a modern invention; and, in the progressive history " of it, it has been gradually becoming more and more refined " and disseverable in its construction, and easily removable in " its character; while, on the other hand, it has grown into the " most important and almost universal implement of trade " brought into operation in these later days. I hold, that there " is not one case in our books which affords any authority for " the decision of the question as it here arises. The case of " Arkwright *v.* Billinge is given up as either erroneously decided, " or standing on the specialities of a contract which excluded " every question of principle. The case of Niven did not relate " to machinery of this description, but to articles of an entirely " different sort, and scarcely indeed to machinery at all, and " was besides involved in other important specialties. The case " of Stead also depended on the real intention of the parties in " a specific contract. It was a question whether the large " machinery had passed to Paterson at all. But it was *per* " *expressum* a part of the subject let by the lease, from the rent " stipulated, in which it was sought to be deducted.

" I may here, however, advert to the case of the *threshing* " *mill*. I should think it hard, certainly, to decide so important " a point as the present by what was done in a small matter " like that. But such as it is, it is direct and decidedly against " the respondent. In Hyslop *v.* Hyslop, Jan. 18, 1811, Lord " Armadale (a very good lawyer) held and decided that, though " the stone part of such a structure was heritable, the *machinery* " *was moveable;* stating expressly in his interlocutor that, in so " finding, he followed *a previous judgment of the Court.* The " party against whom that and other points were found, reclaimed " against the interlocutor; and though it is true that the report

"does not shew that that point was argued, and the Court did "not actually decide it, the presumption is, that it was known "to have been previously decided, and felt to be too clear for "argument,—I had understood the law to be so settled ever "since, though it was understood that there was no actual judg- "ment on the point; and it was a question between *heir* and "*executor*. A possible doubt was indeed raised on the point, "under the impression of the case of Arkwright, before the real "nature of that case had been explained in the case of Niven. "Yet I own I read with surprise an assumption in the "opinions before us, that it can now *admit of no doubt* that "such machinery goes to the heir. I can only say, that I not "merely doubt it, but should have believed that it must be "decided the other way. Surely it would be so between land- "lord and tenant; and, in that of *heir* and *executor*, it just "comes to this, that the heir must pay for it as for other farm "stock, if not otherwise arranged. The decision as to Short's "*great telescope* was to the same effect, and is really a very "strong precedent.—Bell, I., 753.

"But I beg leave more generally to observe, that I con- "sider the progress and tendency of the law to have been "altogether in the opposite direction;—that is, to *relax*, and "not to *tighten*, the old principle of fixture. It is impossible "to read the passage in Mr. Bell's work (Com. i., pp. 753–4,) "without seeing that he was very strongly under that impres- "sion, even while struggling with the cases of Billinge, &c. "See particularly a strong passage in p. 754. After some "general reasoning on the effect of the employment of stock "in trade and manufactures, and reference to English cases, "he adds:—'These are distinctions which equity and public "'expediency, as well as mercantile understanding ought "'perhaps to recommend to adoption, *even in the case of suc-* "'*cession ab intestato*; and they do not seem to be inconsis- "'tent with the common law of Scotland, in regulating the

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" ' interests of the parties to a contract of temporary posses-
" ' sion.'

" It appears to me, therefore, that the present question
" ought to be considered on broad general principles, with
" reference to the distinctive nature of the subjects to which it
" relates, the particular mode of affixture, the purpose and
" design for which they were placed in the situation where
" they were found at Mr. Dixon's death, and his own under-
" standing concerning the character thereby impressed on
" them, or retained, according to their original state, as a part
" of his general property.

" Before a correct judgment can be formed on this part of
" the subject, the precise *facts* must be attended to.

" 1. The articles of machinery in question are all, in their
" own original nature, moveable subjects, made and completed
" *as works of mechanism*, and constantly bought and sold as
" *moveables*, without reference to any particular building or
" locality.

" 2. When such an engine is to be applied to use, sometimes
" it is placed on the ground, without being attached to any
" house or stone-building, though it is fixed in a certain way
" for stability; but more generally a building is erected for
" securing and protecting it. But it is clear on the report, that
" when this takes place, the *building* is made *for the machinery*,
" and adapted to the purpose of receiving and covering it,—
" not the *machinery for the building*. The machine is the *prin-
" cipal*, the building but an *adjunct*,—' the *skeleton* or *frame-
" ' work* of the general structure,'—and the *value* of the machine
" is more than five times that of the building.

" 3. The mode of placing and securing such a machine for
" use is arbitrary and various.

" 4. But, after an engine is so fixed or attached, it is done
" in such a manner, that in general it can be easily removed,
" without any great injury to itself or to the building. There

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"are, no doubt, some differences in this respect in the different "articles described, and there are some, (such as the *blast* "*furnaces*,) to which this does not apply at all. But I now "speak of the ordinary steam-engines, pumps, and other articles "similarly described. Blast-engine, tilt-engine," and so on, enumerating various articles. "All the rest, except the *blast* "*furnaces*, and the coke oven mounting, are simply moveable. "The *expense* of *removing* them is less than *one-eighth* of the "value.

"5. It is a matter of constant practice to remove them.

"It might seem a very elementary remark, that in the "question whether a particular article or subject is in *law* move- "able, it cannot be an immaterial consideration that it is in "*fact* moveable, *easily removable, practically removed*, sold, &c., "every day; that it may be made with ease to follow the person, "whenever the *locality* of his trade is shifted. Yet the argu- "ment for making such subjects heritable is derived from a "maxim which supposed a very different state of the fact. "*Quod solo inædificatur solo cedit* supposes the erection of a "house, or other *permanent* structure, which cannot be removed; "and it means that the property of the soil gives a right to the "house. *Cujus est solum ejus est usque ad cœlum.* But the "question still remains what *inædificatio* imports; and it does "not follow that it includes a mere implement of trade tem- "porarily fixed on the premises, which is easily removable, and "would be equally valuable when moved to another site.

"If the mere fact of an *affixtion* thus characterised must "still have the effect of rendering such articles legally heritable "subjects, it should do so, in correct reasoning, in all cases "alike. But if it is and must be granted that it does not, and "that, in a variety of cases, the very same subjects are to be "accounted in law moveable or personal estate, it must be "open to the Court to consider whether, in the circumstances "of this case, it has such an effect; whether, the engines and

" other articles being easily removable, though fixed in a c
" manner and degree, there are not other considerations
" bining with this to control the effect of such junction.

" It appears to me that the second ground of judg
" urged, and largely relied on in the opinions, viz., that
" subjects of property are made heritable *destinatione*, not
" is fallacious in the inference deduced under it, but, as a
" ciple, ought to lead to the opposite conclusion.

" Here it is necessary to remember what the true st
" the question is. It is not a question between heir an
" cutor. Where it is so, and the party has any special i
" tion as to the destination of such subjects, he can alway
" effect to such his intention by very simple deeds; and t
" an answer to all the apprehension of inconvenient c
" quences from the principle of holding them to be
" moveable *in that case.*

" But a man cannot disappoint the *legitim* by any
" deed of destination. He cannot make that to go to th
" which is in itself moveable, to the prejudice of the *legitim*,
" by a direct declaration of a purpose to that effect.
" therefore, the principle of destination, to have any effe
" this question, must be applied in a very different m
" from a mere presumption of a wish to prefer his heir t
" younger children, as the creditors for their *legitim*. T
" can be no such presumption in law. The presumption i
" reverse—that, as administrator of the goods in commu
" he has no intention, by indirect acts, to alter the state
" rights and interests of his children at his death, but r
" intends to preserve them entire.

" It is very true that the father may relieve himself
" the claims of his younger children, in regard to his prop
" in several ways. He may transact with them, when of
" for a discharge of their *legitim*. He may settle all by
" in such a manner as to satisfy them all, without in

"as to the heritable or moveable state of the property. But "wherever the claim of *legitim* does arise, there is but one way "in which that which was a *moveable* subject or fund in itself, "can be effectually withdrawn from that its legal condition, in "a question between the heir and the younger children who "have not discharged their *legitim*. No doubt this may be "done. If the father, in his lifetime, in the discretionary "management of his affairs, *bona fide* changes the actual or "legal state of his property from moveable to heritable, he has "perfect power to do so. If he applies money to the purchase "of a land estate or a house—if he lends money on heritable "bonds,—or if, in any other manner, he turns what is *personal* "into any *known* form of heritable property; in any such case, "the fund of *legitim*, as well as of executry, will be thereby "diminished at his death; not certainly on any supposition of "a *destination*, or purpose to defeat the *legitim*—but simply "because the *legitim* applies only to the personal estate, as it "stands at the father's death, and rather on the assumption "that there was no such purpose, and that the result is brought "about in the course of fair and natural administration.

"But when a man lays out his money in the purchase of "goods which are in their own nature moveable, and at his "death the question arises, whether, in the state and situation "in which they are then found, they are parts of his herit- "able estate, or of his personal estate, in that question there "can be no presumption of favour to the heir, or that by acts "having no reference to succession, he has conferred a benefit "on him, and impaired the rights of the younger children. It "may be found so in the result of the question. But in that "question the presumption is the reverse—that the rights of "succession, more especially onerous rights, are not altered "by equivocal acts in the ordinary use of subjects of property.

"How then does the principle of destination really apply "in the present case? To what were the various articles con-

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" descended on destined? The assumption in the argum
" of the pursuer is, that they were destined to make part
" the heritable estate for the benefit of the heir—or desti
" by incorporation therein (independent of mere affixtion),
" make part thereof in succession.

" To me it appears that the proposition set against this
" affirming a matter of fact, more than an inference of law
" sound and true—that they were destined solely to the purp
" of the trade to which they were subservient. Is not this
" truth to be deduced from all the facts in the record and
" report? Though there were not the most direct evide
" that it is so, I should think that the very nature of the c
" proved it. Here is a man engaged extensively in a partic
" species of trade and manufacture, who, having realised la
" personal funds by means of it, employs those funds in p
" secuting the same trade still more extensively. In doing
" he may have acquired certain property, so decidedly of
" heritable nature, that, remaining in his own exclusive p
" session, it must be accounted heritable in all questions. Y
" even in this point, there is this peculiarity, that even in su
" acquisitions, there was a single view to the promotion of
" trade, and no view to the creation of a great heritable est
" in his heir. The various subjects were detached parcels
" land, evidently, and indeed expressly, purchased for the s
" purpose of being made subservient to his views as a trader
" coal or iron. It is not even the common case of a man wh
" having a landed estate, and discovering a mine in it, mal
" arrangements for working it to profit. Here it is all a matt
" of trade—sometimes with the minerals to be wrought up
" found within the ground purchased, and sometimes the s
" selected for a work merely for the sake of its locality, t
" materials being drawn from other places.

" When, in such circumstances, the trading speculator pu
" chases moveable articles necessary for his trade—articles

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"manufacture, to be formed in one place and transported to "another—while that which he acquires is itself a moveable "subject, it is manifest that the only destination connected with "it is a destination for the purposes of his trade. If some "degree of fixture is necessary for stability in taking the use "of it, that is but the means of using it as an implement of "trade, and still the only destination of it is for the trade. "Lord Lyndhurst has put the case of a stocking-frame, which is "usually fixed to the floor for stability; and yet, being easily "removeable, and destined only for trade, he holds to be un-"doubtedly personal. And so of other small machinery, such "as was found to be moveable in the case of Stead. There "may be a difference in size and degree between the steam-"engine of a colliery or iron-work and a stocking-frame; but "there is none in principle, if it be ascertained that the one as "well as the other is easily removeable, and in use to be moved "from place to place: And still there is no destination, and no "ground for presuming destination of it, for anything but the "trade.

"But in the present case it is quite certain that Mr. Dixon "himself had no idea that he had, by destination, or by "anything done, rendered those moveable articles part of "his heritable subjects. It is said that his opinion in point of "law could not render them moveable if they were truly herit-"able. That is very true, once it were found that they were "heritable; and if the whole point in controversy might be "at once assumed, the observation would be very just. But, "*in the question whether they were heritable or not*, and when "it is maintained that Mr. Dixon made them heritable, and "that *destinatione*, surely his own view of the effect of what he "did cannot but be of importance.

"Now, 1*st*, All the articles in the condescendence consti-"tuted part of Mr. Dixon's *stock in trade*, and were so reckoned "by himself in his books.

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"I must think the respondent's mode of pleading in this "point very incorrect.

"In the Lord Ordinary's note, he stated that the fact "might perhaps be taken as admitted. He added, that if "this should be objected to, it might be put in the remit, or "ascertained in some other way. When this was so stated, if "the respondent did not hold it to be admitted, he was bound "to say so, that the Lord Ordinary might judge whether to "express it in the remit or not. As he did not do so, I held "it as admitted—and for that reason only did not make it a "special point of inquiry. Probably there are general clauses in "the remit, sufficient to have warranted what Mr. Smith has "reported on the subject.

"But the respondent, after letting the remit go, without "interposing one word of objection against the Lord Ordinary's "supposition, that the fact might be taken as admitted, objected "to Mr. Smith stating it in his report. And he then let it "pass, without even yet making any denial of it, or requiring "any other investigation. In such circumstances, I hold it as "an admitted fact in the case.

"But, whether it be admitted or not, I think that it clearly "appears upon the facts and documents reported, independent "of Mr. Smith's report of the inference. The accounts en-"tered in Mr. Dixon's books distinctly shew this; and though "it is very true, that, in stating the whole stock of which he "was possessed, he also puts down his proper heritable pro-"perty connected with the various works, these subjects are so "pointedly separated and distinguished from the machinery "and other articles which he esteemed moveable, as only to "strengthen the inference that all of these latter were taken "by him as constituting his personal stock in trade. In one "instance, indeed, that of the Calder Coal and Iron-Works, "in which the land occupied was merely occupied as the "site of those works, both the coal and iron being brought from

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"a distance, Mr. Dixon seems to have had so strong an impres-
"sion that all that was placed there was merely stock in trade,
"that, in the inventories made up, he has included even the
"houses and buildings with the machinery, &c. If this be
"thought in any respect to weaken the inference as to the actual
"view which Mr. Dixon entertained, it shews, at all events, how
"strongly he took the articles of property in question as being
"merely his stock in trade; and though such a fact may not be
"sufficient to render subjects which are clearly heritable in their
"nature, and his own exclusive property, personal estate in him
"at his death, it does not follow that the fact is not still very
"material, with regard to all the articles which do not bear any
"such distinctive character.

"But, *2nd*, There is direct proof that Mr. Dixon considered
"and treated all the machinery in question as still moveable
"effects in his possession. I shall not go into the detail of par-
"ticulars, which might be necessary, if my view of the principles
"of judgment were not excluded by the opinions of the con-
"sulted Judges. But just look at the state of the matter in the
"case of the great work of the Govan Colliery. First of all,
"the heritable, clearly defined, is conveyed by one deed of dis-
"position, which bears no allusion to any part of the machinery;
"and then, separately, an *assignation* is taken of the personal
"property, consisting expressly of the steam-engines, machinery,
"utensils, &c. Then there is an inventory and valuation of the
"whole entered in the books,—the first part of which is,—'In-
"ventory and valuation of the *moveable* property belonging to the
"Govan Colliery, viz., *steam-engines*, machinery, and utensils,'
"&c., &c., in which not one article of a proper heritable nature
"is included. And this is followed by a separate inventory and
"valuation of the 'heritable property, viz., lease of colliery,
"farm,' &c. When, again, Mr. Dixon acquired the sole pro-
"perty of the Govan Colliery, and all belonging to it, separate
"conveyances were again employed, the engines, &c., being all

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" assigned *by bill of sale as moveable subjects*, while the heritable
" property was conveyed by *disposition*. And then there are
" separate inventories and valuations again entered in the books
" which are all *holograph of Mr. Dixon himself*, by which, after
" setting down with remarkable accuracy and discrimination
" under nine heads, everything which he treated and meant
" be taken as heritable property, he goes on, 'the *moveable* pro-
" 'perty *consists* of the *steam-engines*, gins, wagons,' &c., &c.
" The inventory itself runs thus, accordingly,—'Inventory
" '*moveable* property, machinery, and utensils, £2172; *seven*
" '*steam-engines*, £4010,' &c., &c.

" I take this as an example of what, in one form or another,
" though not always so simply, appears in regard to all the
" similar articles of property condescended on. And I must
" regard it as of very great importance in the question. For,
" 1. it confirms in the strongest manner Mr. Smith's report
" as to the practice and understanding of the trade as to the
" moveable nature of those subjects. In any similar investiga-
" tion, Mr. Dixon's testimony would, from his great knowledge
" and experience, have been the very best possible after Mr.
" Smith's own. But, independent of any testimony or opinion,
" the things done bear real evidence of the decided under-
" standing. For, if the steam-engines were, either by affixtion
" or destination, or both together, effectually rendered incor-
" porate parts of the land or building, so as to pass with them
" whether by a disposition silent regarding them, or by suc-
" cession *ab intestato*, of what use would it be to include them in
" a separate personal deed of assignation as moveable effects?
" It never could have been thought of. Even if it had been
" intended to make them pass with the heritable subjects,
" would have been enough to specify them in the one deed of
" disposition, as held in the case of Arkwright. But the pointed
" nature of the proceedings in this case demonstrates the reality
" of the impression, that they constituted property of a very

"different order and character from the heritable subjects on "which they were placed.

"But, 2, Is Mr. Dixon's own belief, and understanding and "dealing, of no moment, when it is said that these moveable "articles of trade were made heritable in his estate *destinatione?* "Mr. Dixon lived and died in the full belief that they were parts "of his moveable estate; and no man can doubt that, if he had "died *intestate,* as might have happened, he would have died in "the belief that they would be so taken at his death. That he "made a special settlement does not alter the state of the pro- "perty, or his belief regarding it,—though I fear it has too "much practical influence in the question.

"But the manner in which the party has himself dealt with "the subjects has always been held to be a legitimate element "in the question. It was so in Arkwright and in Stead; and "it was very pointedly so regarded by Lord Lyndhurst in the "case of Trappes.

"It must always be remembered, however, that it is not on "this fact alone that any opinion for holding the subjects to "be moveable is rested. It must be combined with all the "other facts,—particularly that they are easily removed, and "constantly in use to be so,—that they are of equal value when "removed,—that they are placed there for trade only,—and "that they may be so on a very temporary possession of the "ground, and where that ground is merely the site of the trade "carried on.

"It is asked, how it is for the benefit of trade that such "subjects should be held to be moveable in succession? I "answer, that it always must be for the benefit of trade that "the course of succession to a man's property at his death "should not be altered by what he does for the purposes of "trade only, unless he has decidedly changed the nature of it "to all effects whatsoever, to the evident perception of himself "and all mankind. It will not do to assume that the things

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" ARE made heritable by affixtion, and then, on that assumptio
" to say that he is bound to know it. The question is, whet
" they are heritable or not? And it is nearly granted that th
" are not heritable to all effects. But a stronger case of inj
" to trade can hardly be figured than that which here occ
" if it be considered apart from Mr. Dixon's settlements,
" where a man has put his whole capital into trade, and di
" tinctly recorded in his books the purpose and belief, th
" articles of great value, purchased as moveables, are still to b
" taken as part of his moveable estate, notwithstanding th
" situation in which they are placed,—and, at his death, th
" rights of his wife and children are found to be completel
" inverted or taken away by a constructive change of the
" legal character.

" I shall not enlarge further. It appears to me, in genera
" that all the articles in the condescendence, as reported, wi
" the exception of the blast-furnaces, and a very few oth
" articles, which it appears are practically not removable, oug
" to be held to be moveable in the present question.

" I have adverted to the Scotch cases, none of which,
" apprehend, can be held to have settled the point. But
" must still take notice of the English authorities quote
" though I can only speak of them with great diffidence.

" It appears that there was in England a strict rule co
" cerning fixture, even more rigid than that in Scotland. B
" it is equally clear that it has been gradually relaxed. Th
" grounds of relaxation are precisely those I have been con
" sidering,—the purpose of the annexation as being for trade,—
" the facility of removal,—the practice of removing,—th
" building being only for protection,—their being only partia
" annexation,—the subjects being treated as moveable in th
" accounts of stock.

" I shall not attempt to go minutely through the case
" which appear to be well explained in the papers, and mor

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"surely in Lord Lyndhurst's speech in the case of Trappes. "But it is remarkable that the very earliest case of which there "is any notice, that of the cider mill, decided by C. B. Comyn, "was a case between heir and executor; and, in deciding "Lawton *v.* Lawton, Lord Hardwicke noticed the very case of "a fire-engine, holding that, even between heir and executor, "'it would be hard that in every case it should go to the "'heir.' What would he have said if the case of *legitim* could "have been in his view?

"I do not pretend to form a judgment how far all the cases "can be reconciled. Lord Lyndhurst seems to think they "may. But the rules are stricter in the Common Law Courts "than in the Equity Courts. The result is clear, that between "landlord and tenant—between tenant for life and remainder "man—between mortgagor and mortgagee—such machinery, "and specially a fire or steam-engine, has been held personal "estate. It is said by Lord Hardwicke not to be *so frequently* so held between heir and executor; and there is one "judgment of Lord Mansfield (in the Common Law Court), "in the very special case of salt-pans, attached to a salt-"spring, holding them to be *real;* of which, however, an "explanation, thought to be satisfactory, is given by the "English lawyers.

"But I come at once to the case of Trappes, decided very "solemnly by Lord Lyndhurst. It was a question between the "assignees of a bankrupt and the holder of a mortgage. The "mortgage deed conveyed expressly, with the 'lands and "'buildings, the steam-engine, mill, gearing, heavy gear to "'millwright work, fixed machinery, *and other matters and* "'*things erected and then standing.*' The assignees did not "claim the steam-engines and water-wheels, holding these "to be given by the mortgage deed, just as in the cases of "Arkwright and Stead, although there is this very important "difference, that a debt secured by mortgage is believed to be

" still personal estate. But they claimed all the other
" nery, as not carried by the general terms of that deed;
" was held that it did not so pass, and was not inten
" pass; and that, 'if it did not so pass, it is to be looke
" 'as PERSONAL estate.'

" But *why* was it held not to pass, or not to have
" intended to pass? 'In *taking the stock*, it appears th
" 'land and buildings were constantly placed under one
" 'and the machinery under another. It also appear
" 'machinery of this description is, in that part of the co
" '*constantly bought and sold* without reference to the fre
" The conclusion of Lord Lyndhurst is direct to the
" 'We are of opinion, therefore, that, with respect to mac
" 'of this description, erected by the bankrupts *for the pu*
" '*of trade*, it would have passed to the *executor*, and not
" '*heir*, and that it was the partnership estate of the bank
" This is the doctrine held upon a review of all the cases.

" Now, 1. It is decisive as to all the small machinery
" present case, for all the same facts are here combined f
" dering it personal estate.

" 2. As to the steam-engines, &c., there is here no deed
" which they can be held to pass as heritable, or in con
" with heritage.

" 3. There is direct proof that they were intended to
" as personal estate, being so placed in all the accounts of

" 4. The opinion is direct that such machinery, so treat
" dealt with, must be accounted personal, even between h
" executor, adopting the dictum of Lord Hardwicke, with
" reference to a fire-engine.

" And, 5. The present case is *a fortiori* of any case
" and executor.

" I have only now to advert in a few words to two poi

" 1. In regard to the *Glasgow Foundry*. The ground
" Mr. Dixon's property, he let it to a company, but *of*

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"*he was himself a partner* for four-ninths, and under an obliga-
"tion in the lease he erected machinery. Now the consulted
"Judges may be right in saying, that, so far as the machinery was
"his property, it is the same case with that of most of the other
"works. But here it is overlooked, that the assumption so
"largely gone upon before, that the machinery was erected *solely*
"*for the purpose of realizing the produce of the ground, entirely*
"*fails*. The whole materials wrought at the foundry were brought
"from the *Calder Coal* and *Iron*-works. The ground of the
"foundry was the mere *site of a trade*.

"It is also overlooked that, besides the machinery erected by
"Mr. Dixon, there were tools, implements, &c., which belonged
"to the company. Certainly his *shares of these* were *personal*
"estate.—Kirkpatrick *v.* Syme.

"2. The other point is that referred to in the last paragraph
"of Lord Cockburn's opinion, from which Lord Cuninghame
"and others have dissented.

"It is a very important point. There can be no doubt that
"the machinery erected by Mr. Dixon, as a *tenant*, was his pro-
"perty, and that, according to *all* the authorities, he had a right
"to remove it as *personal* property. This is the very point con-
"ceded on all hands, that, in a question between *landlord* and
"*tenant*, such property erected by the *tenant* is personal estate
"and belongs to him.

"Being *personal* estate, and on that ground alone vested in
"the tenant, it might seem a very elementary proposition, that
"it *must* be part of his *moveable* estate at his death. And so
"Lord Cockburn holds.

"But even this will not be granted to the child asking *legi-*
"*tim*. And why not? Because the articles were placed on the
"ground for the purposes of the lease, and the heir cannot con-
"tinue to trade under it without them.

"This is really driving the doctrine into a very strange posi-
"tion. *Fixture* is out of the case, for that would make them

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" belong to the *landlord*, as part of the freehold. But, agai
" that principle, they are held to be *personalty* in the *tena*
" and on *that ground* he may *remove* them when he pleases.
" his death they are his *personal* effects, for he had no other ti
" to them. They are so just as much as the carts and hors
" on a common farm. True, it may be inconvenient for th
" heir in the lease that the stock in trade, or the farm-stockin
" on a farm, or the furniture of a house, should be sold
" carried off. But I never yet heard that that was any reas
" why in any such case what is personal estate in the tena
" should not be so reckoned. I suspect the collectors of th
" *legacy duty* would hold a very different doctrine. It is a pro
" tion which would alter the course of succession to every tena
" in Scotland. There is no more difficulty here than in a
" other case. In all of them, the things or similar things a
" *necessary* to the use or working of the subject; and the h
" must either transact with the younger children or executo
" or supply himself otherwise, which, it is proved, he may
" easily do in this case as in any other.

" And see what strange results it might bring it to. T
" lease may be within *half-a-year* of *expiring*. What would
" machinery be then? It would come to this, that being c
" tainly *moveable* in his person, they would be *personal estat*
" his succession if he died the day after the lease expired,
" *heritable* if he died a day before the term.

" In short, we are required to hold that this property,
" doubtedly *personal* in the *tenant*, is yet, without any cha
" on it, *heritable* estate in his succession. I apprehend that t
" proceeds on an entire mistake as to the meaning of the pr
" ciple by which things may be made heritable *destinatione*. I
" in short, I cannot assent to a proposition which appears
" me to involve such inconsistent results, and to lead to
" greatest confusion in the succession of all tenants in Scotla

The opinions of *Lord Cockburn* and *Lord Moncrieff*

adopted by the House on the hearing of the appeal, as representing the two opposed opinions, the reporter has therefore given them in full, so far as applicable to the general question of law, which alone he has thought it necessary to embrace by this report. In doing this he has necessarily excluded those parts which bear only upon whether any particular article was moveable or heritable. The reader desirous of inquiring what articles were held to be heritable, and what personal, will find the information in the inventory and description in Mr. Smith's report, and the remarks of the Judges upon that inventory noticed below, (which will be found in 5 *B. M. D.* and *Y.* 829,) coupled with the final interlocutor of the Court, given below.

The Judges concurring, as well as those dissenting from the opinions of the consulted Judges, agreed in directing the papers to be again laid before these Judges, for the purpose of their stating what portions of the machinery they considered to be moveable in conformity with their opinions. This was done by the word "heritable" or "moveable," as the case might be, being marked on the inventory and description in Mr. Smith's report by the consulted Judges, who made this addition to their opinions: "As to the engines and other machinery for working "the collieries of which the late Mr. Dixon was not the owner, "but only the tenant, and which belonged to the landlord,—in "respect it is admitted by Mr. Dixon, and not disputed by the "claimants, that they never belonged in property to the defunct "during his life, and so were not *in bonis* at his death; and further, in so far as regards such subjects under lease on which "the late Mr. Dixon, being the tenant only, made erections, "which he was entitled to remove at the end of the lease, which "the respondent also admits must be included in the executry, "we are of opinion that the Judges of the Second Division may "now dispose of the two articles in the appendix to Mr. Smith's "report, articles 6 and 7, having regard to our former opinion, "without further opinion from us."

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Thereafter the Court, on the 7th March, 1843, pronoun
the following interlocutor, which was the one appealed from

"The Lords having resumed consideration of the revi
"cases for the parties, dated 4th November, 1839, with
"closed record, Mr. Smith's report, and other proceedi
"therein referred to, and the opinions of the consulted Jud
"dated 14th January, 1842, and the additional opinions of
"consulted Judges, dated 28th February last, in respect of th
"opinions of a majority of the Judges, and in conformity the
"with, find, that the instruments, engines and machinery d
"scribed and referred to in Mr. Smith's report, which, in t
"circumstances of this case, fall to be held and treated as *her*
"*able*, and those which fall to be held as *moveable* property
"the succession of the late Mr. Dixon, are respectively as f
"lows, viz.,

"First,—That of the instruments, engines and machine
"specified in article 4 of the revised condescendence for Mess
"Dixon, No. of process, the following are to be held and treat
"as heritable:—(1). The blast-engines for blowing the furna
"at Calder Iron-Works, Nos. 1, 2 and 3, with blowing appara
"complete, as also the blast-furnaces themselves. (2). T
"engine (8-horses power), in very bad order; clay-mill a
"great going gear from steam-engine for drawing it, and turni
"lathe, tilting-apparatus, two hammers and shears, all out
"order—all at the Calder Iron-works. (3). Engines for thra
"ing and corn-mills at Calder, eight-horses power, with pi
"from engine to canal (in best order); thrashing-mill (worl
"by steam-engine; corn-mill (one pair stones for shealing, a
"one pair for grinding) with the sack-tackle, kiln-head.
"Faskine pumping engine, 40 fathoms eight-inch pump, in t
"lifts, with shear-poles, capstan and ropes (in bad order); No
"gig-engine, with winding apparatus, pit-head frame and ro
"(in bad order); No. 4, winding machine and winding appa
"tus, conical drum, and pit-head frame and round ropes, woo

" beam, iron mounted and plumber blocks, cast-iron cistern. " (5). Blowing-engine at the Wilsontown Iron-works, with " blowing apparatus, and water-pressure and two boilers. (6). " Rolling-mill engine at Wilsontown, with rolling apparatus and " two boilers; two steam-engines for working forge-hammers, " with two boilers and machinery for working four hammers, " with two cranes. (7). The following engines and articles at " Govan Colliery:—old water-engine, 50-inch cylinder, with two " boilers, and three lifts of 12½-inch pipes, capstan and ropes, " including tools and implements for working engine (engine " and boilers in bad order); water-engine at Polmadie engine- " pit, 44-inch cylinder; one boiler, with 28 fathoms nine-inch " pipes and rods, including capstans, ropes, tools and implements " for working engine, in so far as such tools and implements are " attached or fitted to this particular engine: gig-engine at Pol- " madie engine-pit, with winding apparatus and ropes; Neil- " son's Pit water-engine, 33-inch cylinder, with 24 fathom nine- " inch, and 9½ fathom 6½-inch pumps, and winding apparatus, " capstan, ropes and tools used for working engine, in so far as " such tools, &c., are attached or fitted to this particular engine; " engine at Gateside-pit, with winding apparatus and ropes; en- " gine at Firs Pit, with two boilers, and winding apparatus and " ropes (engine and one of the boilers in very bad order); old " materials of Quarry Pit gig and water-engine, with 54 fathoms " 6½-inch pipes and pump rods; one boiler useless; remains of " corner pit gig, pumps and rods in Polmadie Pit. (8). The " Glasgow Foundry steam-engine, 14-horse power, with one " boiler and engine tools, in so far as such tools are attached or " fitted to this particular engine, and condensing and water-pipes " to and from the canal; blowing apparatus, with air-chests and " pipes to cupola, including second walking-beam, connecting " rods, &c.; great going gear from steam-engine for driving clay- " mill, turning-lathes, and part erected for boring-mill, including " clay-mill; three cranes in foundry, with gearing and blocks;

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" crane in smithy; small crane in boring-mill; smaller one; pair
" long wooden shears for turning-lathes, with three sets turning
" lathes heads; and that the other tools, implements and articles
" specified in article 4 of said revised condescendence for Messrs
" Dixon, viz., all spare and duplicate articles for working the
" blowing-engine and apparatus, and the rolling-mill engine and
" rolling apparatus at Wilsontown, the unattached tools and im-
" plements used for working the water-engines at Govan Col-
" liery, and the engine-tools of the Glasgow Foundry steam-en-
" gine, in so far as not fitted to that particular engine, are to be
" held and treated as *moveable*.

" Second,—That of the instruments, engines and machinery
" enumerated in article fifth of said revised condescendence for
" Messrs. Dixon, the following are to be held and treated as
" *heritable*,—(1.) Fineries at Wilsontown, viz., a large cistern
" 8 feet × 3 × 2; finery water-boxes and air-chest, one water
" trough. (2). Two standards in stone there. (3.) Two cir-
" cular plates for crane foot; one crane beam, mounted; two
" wooden ditto there. (4). Gin at Middle Moor Pit; gin with
" old ropes, (Wilsontown). (5). Greenwall water-engine, with
" capstan; 16½ fathoms 9-inch pump, timber beam and framing.
" (6). One horse gin, with pit-head frame and pulleys at Govan
" Colliery. (7). Railway at Port-Eglinton, consisting of 286
" rails, four feet long, 1449 sleepers, one coup rail, two tur
" plates, 17 crosses and forks for offsets, 1008 heavy slabs fo
" crossing roads, three crosses and forks for offsets (bad casts
" and couping machine at Port-Eglinton. And that the othe
" articles and implements enumerated in article 5 of sa
" revised condescendence for Messrs. Dixon, being (1) Smith
" hearth-plate, timp in cast-house, ball for breaking hea
" goods, 225 coke-yard rails, 89 oven covers, 17 turning-lath
" in coke yard, screw stalk in smith's shop, two smith's sw
" at Wilsontown. (2). Fourteen water boxes, two break
" racks, two plumber blocks, four pit-head wheels, one

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"one wrought-iron scale for a weighing-beam, eight dampers, "mounted plates, and barrow runs on floor; one crane-step "at Wilsontown. (3). Tongs, hooks, wrestlers, ringers for "cutters, bolts and wedges; 19 pair cutters, teeth and other "plates for it; 50 spanners, six pinions, two rests for straight "edge, seven crates and one plate, one centre-point standard, "two standards, seven rests, two large standards, two spur "pinions, seven crabs, 20 coupling boxes, seven shafts, four "top-riders, one large and one small cistern, two moveable "benches, wooden ditto, hoop shears wrought by engine, cast-"iron plates on mill-floor, 17 pair rollers at Wilsontown. (4). "4356 flat rails above and below ground, 92 corves, 43 colliers' "whirlies, 156 bench plates (cast-iron), four stone mills, two "hearth-plates on pit-heads, one fire-lamp, 44 corf-carriages, "two weights on bridge (cast-iron); two weighing machines and "weights, eight riddels, two weighing hutches, one redd ditto, "eight wheelbarrows, two wagons for loading char at Faskine. "(5). Five corf-carriages, four slipe hutches at Faskine. (6). "2688 rails, 224 ditto double, five offsets complete, 140 "circular rails, 34 coke yard rails, 12 limestone waggons, six "coal ditto, 199 flat and 27 circular rails, one iron measure for "lime, 12 hutches, part of an old gig-engine, 12 hutches, two "windlasses, and two waterbarrels at Wilsontown. (7). Four "weighing machines for carts, never bolted to the building, "three small weighing machines for colliers' hutches, two jack "rolls (12 feet long) with stools, sixty-one corf-carriages, eight "hill ditto, 88 hill ditto, 88 whirlies, 10 slipe hutches, 59 "corfs, four small sinking kettles, one ditto ditto (bad), three "large and three small water buckets (strong), four small wind-"lasses ditto, eight wheelbarrows, one large hanging scaffold "(with slings), one pair pump-slings, one ditto, two corf-"carriage frames, two hill ditto, two slipe ditto, two whirlie "frames, two ditto clad with wood, one water whirlie, air "pumping machine (with 202 yards white-iron pipe), 5¼-inch

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" diameter, one cleek for pit bottom, four fire-lamps, one ditto " lamp, six old gin trees, three sinking pails, six new wagon " frames, shape of pit (malleable iron), net for slinging horses " (very old), hude for carrying lime, three pair drawing ropes " (old), materials of an old weighing machine, boring rods, 15 " sets blasting tools, 30 sinking picks, 19 coal ditto, 12 wedges, " useful old iron plain work, ditto screwed work, new wrought- " iron plain work, colliery implements of wrought-iron, useful " articles of brass, 3029 rails (horse road), 1430 sleepers, 683 " snugs, 34 offset sleepers, five pattern sleepers, 45 crosses and " forks for offsets, four turnplates for carriage roads, 402 rails " (old horse road,) 201 sleepers, seven hinge rails (whirlie road), " 914 yards rails (laid in pit), 36 common ledge rails, 602 yards " ditto in pits, old cast-iron broken rails, colliery implements " (various), wrights' ditto, 14 pulley-wheels for round ropes, " four ditto for flat ditto, one pattern rope, 116 carriage wheels, " with 58 axles, nine small carriage wheels, five old small " pipes, two pipes (9½-inch diameter), one working barrel (12 " inches), 33 wagon rods with brasses, 28 bushes for whirlie " wheels, sleepers and cods for corf-carriages, cods for ditto, 19 " furnace bars, one old working barrel, one old basket door " piece, one drum-shift, one hand-pump, one suction piece, " cistern for horses at stables, 164 fathoms new flat rope, small " round rope, old rope, one damper frame and cover at Govan " Colliery. (8). Four spare wagon wheels, 31 wagons, and " two stone carriages, connected with Port-Eglinton railway, " are to be held and treated as *moveable.*

" Third, — That the coke oven mounting mentioned in " article 6 of the said revised condescendence for Messrs. " Dixon is to be held and treated as *heritable,* and the 20 " hearth-stones, 500 feet, mentioned in the said article, are to " be held as *moveable.*

" Fourth,—That the blowing-engine for No. 4 furnace at " Calder, secondhand, with blowing apparatus, partly erected

"only, and in many parts awanting, with two secondhand "boilers and regulating cylinder, mentioned in article 7 of "the said revised condescendence for Messrs. Dixon, are to be "held and treated as *heritable*.

"Fifth,—That the articles and implements enumerated "in article 8 of said revised condescendence for Messrs. "Dixon, viz.:—(1). Bars, hooks and courses, seven throwing-"off and three clay shovels, 22 pig and three sow patterns, "breaking down bar. (2). Engine fire irons. (3). Fifteen "steel yards and boxes, weights, eight mine grapes, three "rakes, four mine boxes, six coke barrows, three coke grapes, "one limestone grape. (4). Six setters and coke shovels, six "grapes for ironstone, three pinches, two iron stone carriages, "four coke drawing grapes. (5). Beam and scales for pig-iron, "weights for ditto, pig-iron barrow. (6). Three rabbles, one "cast-iron anvil, two bearers and chains, one wooden tress, all "at Calder. (7). Two weighing beams and scales, one weighing "machine, one ditto ditto for blooms, two old iron barrows, "two wheel trucks, one old coke barrow, one old pig-iron ditto, "two ironstone carriages, four-wheeled carriage, old weighing "machine at Wilsontown, are all to be held and treated as "*moveable* property.

"Further,—Find as to the articles under the sixth head of "Mr. Smith's report, which belong to the proprietors of the "subjects in which the late Mr. Dixon was tenant, as they did "not belong to him at the time of his death, there can be no "claim over them as the subject of *legitim*, reserving however "any claim which may arise for meliorations claimable from "the landlords, in terms of the leases entered into between "them: *And* with regard to the seventh class in the said "report, erections made on subjects under leases by the late "Mr. Dixon, and which have been removed by the respondents "at the termination of the leases, find that these are *moveable*, "and subject to the claim of *legitim* on the part of the

" claimants, and *decern*, and find no expenses due to either " party in this branch of the cause."

*Mr. Turner* and *Mr. Sandford* for the Appellants, relied upon M'Knight *v.* Irving, *Hume*, 412,—Hislop *v.* Hislop, 16 *F. C.* 143,—Elwes *v.* Maw, 3 *East*, 38,—Lawton *v.* Lawton, 3 *Atk.* 13,—Dudley *v.* Ward, *Amb.* 113,—Lawton's Exrs. *v.* Salmon, 1 *H. Blac.* 259,—Trappes *v.* Harter, 2 *Cro.* & *Mee.* 153,—Davis *v.* Jones, 2 *Bar.* & *Ald.* 165.

The *Lord Advocate*, *Mr. Kelly*, and *Mr. Anderson*, for the Respondent, referred to *Stair* II., 1, 2, & 15, II., 2, 2,—*Ersk.* II., 2, 4,—Mags, of Musselburgh, *Mor.* 10585,—Barr, 25 Feb. 1783, *Hailes*, 919,—Gordon, *Hume's Cases*, 189,—Friven *v.* Pitcairn's Trs. 21, *F. C.* 204,—Cox *v.* Stead, 11 *S.* & *D.* 672,—Thresher *v.* East London Water Works, 2 *Bar.* & *Cr.* 608,—Farrant *v.* Thomson, 5 *Bar.* & *Ald.* 826,—2 *Smith's leading Cases*, 114, Lawton *v.* Salmon, *ut supra*,—Elwes *v.* Maw, *ut supra*.

LORD BROUGHAM.—My Lords, this case was heard before your Lordships at great length on both sides, and your Lordships considered that, on account of the length of the case, as well as the importance of the subject-matter involved in point of value, and also in respect of some of the principles which were mooted, and some indeed which were disputed, in point of law, bearing not merely upon questions of the same nature, namely, of *legitim*, but bearing upon the cognate question, which must depend upon the same principles, of the relation between landlord and tenant at the expiration of the term, your Lordships considered that it was fit that time should be taken for considering the case before finally pronouncing judgment. That consideration has been given to it, and I am now prepared to move your Lordships to give the judgment which it appears to me, under the circumstances of this case, it is right to pronounce.

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I begin by laying out of view entirely what was very much relied upon, as it appeared to me, below, and much relied upon in the argument here for the appellant, viz., a distinction taken between this case and a case of inheritance, a case arising between executor and heir. In this case of *legitim*, as I understood them to argue, it is not a mere question between executor and heir, but it is a question between two kinds of heirs. Now that is a sort of argument, I must say, with all respect for those who urge the distinction upon our attention, than which nothing can be more groundless. It is not a question between two kinds of heirs. In what way can you differ this case between heir and executor from the common case, as the argument endeavours to distinguish it? The executor is heir *in mobilibus*. That is the common expression of the Scotch law. The *legitim* here is due to those who are not heirs as to real property—it is that which is due out of what is called in Scotland the Executory Fund, that is to say, that which goes not to the heir, but which goes to the executor. It is then in his capacity of heir *in mobilibus* that the *legitim* goes to the child, that the bairn's part of gear goes to the bairn, because the bairn is heir *in mobilibus*, and, therefore, I cannot, for the life of me, discover how the argument gains at all, I do not say that it loses, but it neither gains nor loses by the distinction—it is left precisely in the same state in which it was before the distinction. It is because it is executry and not heritage, that the *legitim* attaches. After payment of the debts, the surplus fund is divided into three parts, according to the Scotch law, which was originally, indeed, the old Saxon law of England, and which is now the law of Scotland.

That being the case, having relieved it from the embarrassment of this argument, I have not much to urge to your Lordships upon this case, because, upon the fullest consideration which I have been able to give, both to the English law authorities which were cited, and to the Scotch authorities, by which

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it was sought on the one side to turn aside, and on the other side rather to enforce the application of the English law cases, I entirely agree with the Court below, and I should have arrived at the self-same conclusion as that at which the great majority of their Lordships have arrived. There is no doubt a most respectable minority of their Lordships, including the Lord President, and the learned chief of the other Court, and Lord Moncrieff, (to whose authority no person is disposed, generally speaking, to yield more entire and implicit respect than myself,) the most able and elaborate judgment which he has given upon this point thoroughly exhausting the whole case, not only upon principles, but upon its details. But I must say that my mind goes not with his lordship's judgment, but with the equally elaborate and equally able judgment of my Lord Cockburn, who also goes into the principles and into the details of the case. I think Lord Cockburn has really left me little or nothing to add, and I am bound to say that in my view he and the other judges joined with him have come to a right and sound conclusion.

Great reliance was of course placed upon the case before Lord Hardwicke, in our Court of Chancery here, and a similar case which occurred more recently in the Court of Exchequer, I think in Lord Lyndhurst's time. But there was an attempt made to distinguish this case in principle from that, and to show that there was another inconsistent decision in the Cider Mill case, in one of the cider counties, Worcestershire or Herefordshire. Now, it is a remarkable circumstance, that of that case we have the most indistinct and unsatisfactory report; we have really nothing that can be called a record of that case. It was cited in the case before Lord Hardwicke; and I must also say that if that case, the Cider Mill case, is to be taken as it is represented to us as regards the substance of the case, and in its result, my mind goes not at all with that decision. It is contrary, undeniably, to the general principles of our law upon the subject, and

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if the same question were to arise to-morrow, with the circumstances which are represented to have attended that case, it would not, in my very clear opinion, lead to the same result. Therefore I lay it out of view. As my noble and learned friend reminds me, we have a most imperfect account of the circumstances, and, above all, the most material circumstance, of how it was affixed to the soil. For if a cider mill be fixed to the soil, though it is a manufactory, and erected for the purpose of a manufactory, if it is *solo infixum*, it is perfectly immaterial whether it is for the purpose of a manufactory, or a granary, or a barn, or any thing else, it is a fixture on the soil, and it becomes part of the soil.

Can any man say that one of the great brewhouses would belong to the executor because it is erected for the purpose of manufacture, and wholly unconnected with the land? for a brewhouse is as much unconnected with any crops upon the land upon which it is situated, as a cider mill can be said to be—it is for the purpose of brewing beer out of malt, which may have been grown in Russia or in Africa. It has nothing to do with the land, as may be seen by those who will take the trouble of looking at any of the brewhouses in London, which are established in places where it would be very difficult to find a blade of grass, much less a crop of barley to make malt of. But although it is a manufactory, nobody says it belongs to the executor, nor is it what the Scotch generally call an Executry Fund—it would go unquestionably to the heir.

The Scotch law appears to me only to differ from the English law in carrying the principles of our law, as laid down in the cases, a little farther, rather than falling short of them. Upon the whole, therefore, I agree with Lord Cockburn; I do not differ from his argument any more than I do from the conclusions to which they lead.

Then, my Lords, I come to the application of these principles in detail, and I must say in the outset, as to that detail,

of the very little that I have to add, that I should be most unwilling to come to any conclusion which should lead to upsetting or altering in any particular this elaborate judgment thoroughly considered below upon the ground of my differing in opinion, as to the application of this clear principle to any of the details of this machinery. There are one or two articles which I do not quite think have been consistently or rightly disposed of by the Court below. I do not deny that, but I have carefully looked to see whether I could put my finger upon any part which had been wrongly disposed of in favour of the respondent, and against the appellant, in the Court below. If I had found that, I might have been more obstructed in coming to the conclusion at which I have arrived. But my objection is to some of those articles being given to the appellant, not to the respondent; and if there had been a cross appeal I protest that I should have found some difficulty in resisting the argument, that there ought to have been a reversal or alteration in respect of some of those particulars. There are one or two that in looking over I made a query against, of the most trivial nature, upon which I should never advise your Lordships to reverse or alter the judgment below in any respect. I cannot even say that I have a clear opinion as to them. I queried them as having a doubt. There are several articles which the Court below have given to the appellant which it rather appeared to us ought to have been given to the respondent. They have brought within the scope of the executry, and consequently of the *legitim*, particulars which I think might very safely have been given to the heir as real property.

Upon these grounds, therefore, I really have no hesitation whatever, as little as I ever had in any case, in recommending your Lordships to affirm the judgment of the Court below in all its parts.

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LORD COTTENHAM.—My Lords, I concur in opinion with r noble and learned friend, that this interlocutor ought to affirmed; and when we separate and distinguish the real case m some of the points which have been endeavoured to be roduced into it by way of argument, it does appear to me to free from all doubt.

The point which has been already alluded to, namely, that is is not a case between the real and personal representative, t that it is a case between heirs, appears to me to be totally stitute of foundation. *Legitim* can only be claimed by means showing the estate to be personal. The preliminary question , therefore,—Is this personal estate, or is it property attach- le to the freehold, and therefore descendible to the heir? The oment we see that the *legitim* can only be claimed in conse- ence of the property being part of the personal estate, the estion of course assumes its natural shape. Is it personal tate or not? That preliminary question therefore being de- ded, it entirely disposes of the ground on which this has been empted to be distinguished from the other cases which have en with respect to the claims of heirs and those who are ereated in the personalty.

The principal stress of the argument on the side of the pellant has been, that this is to be protected, because it is cessary for the encouragement of trade that this property uld be considered as not belonging to the real estate, but belonging to the personal estate. My Lords, the principle m which a departure has been made from the old rule of r in favour of trade, appears to me to have no application the present case. The individual who erected the machinery s the owner of the land, and of the personal property which erected and employed in carrying on the works. He might e done what he liked with it; he might have disposed of land; he might have disposed of the machinery; he might e separated them over again. It was therefore not at all

necessary in order to encourage him to erect those new works which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of himself, and he might make a rule for himself. It was quite unnecessary, therefore, to establish any such rule in favour of trade, the whole being entirely under the control of the person who erected the machinery.

If, therefore, this be clearly a question of real or personal estate, and if the rule which in some cases has been acted upon of making a departure from the established principles in favour of trade has no application to the present case, what does it come to? Of course we throw out of consideration all the cases which have arisen between landlord and tenant, and between tenant for life and remainder man—because the departure which has taken place in these cases has no application to the present case. Then the case being simply this, the absolute owner of the land, for the purpose of better using the land, having erected upon and affixed to the freehold, and used for the purpose of the beneficial enjoyment of the real property certain machinery, the question is—"Is there any authority for "saying that under these circumstances the personal repre- "sentative has a right to step in and to lay bare the land, and "to take away all the machinery necessary for the enjoyment "of the land?"

Let us consider for a moment, if that be the principle, to what extent it is to go. It is put by Lord Cockburn, (and a very strong illustration it is,) if the owner of the land dig a well and erect machinery for the purpose of using that well, is it competent to the personal representative to come and take away that machinery, and leave the well useless? Yet where is the distinction? Here is machinery capable of being taken away with very little if any damage to the land. Therefore, although machinery is in its nature generally personal property, yet with regard to machinery or a manufactory, if erected upon

the freehold for the enjoyment of the freehold, nobody can suppose that that can be the rule of law. Again, and so with respect to other erections upon land. It is not necessary to go beyond the present case, which is, machinery erected for the better enjoyment of the land itself. The principle probably would go a great deal further, but it is more advisable to confine the observations I have to make to the particular circumstances of this case.

There is no case whatever which has been cited in which that doctrine has been recognised except the one which has been referred to, the Cider Mill case, as to which we really know nothing, except that at the Worcester assizes, a good many years ago, a Cider Mill was held to belong to the personal estate. Why it was so held, under what circumstances, and whether it was a Cider Mill fixed to the freehold or not, we do not know. We know nothing except that this machine, called a Cider Mill, was decided to go to the personal representative. It is impossible to extract a rule of law from a case of which we know so little as that. And, with that exception, there is a uniform course of decisions, wherever the matter has been discussed, in favour of the right of the heir to machinery erected under the circumstances in the present case; and if the *corpus* of the machinery is to be held to belong to the heir, it is hardly necessary to say that we must hold that all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in a detached state from it—still if it belong to the machinery and belong to the *corpus*, the article, whatever it may be, must necessarily follow the principal and remain attached to the freehold.

My Lords, I do not go into the detail of the particular items which have been objected to. I have looked them through, and quite concur with my noble and learned friend, that if any exception were to be taken with respect to particular articles, as to whether they ought to be adjudged to one or to

the other, it would have been for the respondent and not the appellant to take such exception.

LORD CAMPBELL.—My Lords, I have very little to to what has been said by my noble and learned friends have preceded me, except that I entirely concur in the which they have taken of this case. I own I was a good surprised that the point was so much pressed at the Bar— this was a case of *legitim*, and that it was not the whole q tion of what descends to the heir and what goes to the exec My Lords, we all know that *legitim* is a portion of the pers property, and you must first ascertain what is the pers property before the claim to *legitim* can arise. There be no doubt, therefore, that it is in fact the whole quest whether the property in dispute goes to the heir or to executor.

My Lords, I have no doubt in the world that it shoul to the heir, both upon reason and upon precedent. As noble and learned friend, who last addressed your Lordsl has stated, none of the arguments respecting the benefi trade, at all apply to a question as between heir and exec because the owner of the fee being the absolute owner of land, and of the machinery erected upon it, the whole c is in him, and he may dispose of it as he thinks fit for benefit of his family.

Then, my Lords, with reference to the authorities by w we are bound, whatever speculative notions we might enter with respect to propriety and expediency, if we entertain different opinion upon that subject, all the cases are q uniform, both in England and in Scotland, to show that t property shall go to the heir. The only case the other which has been referred to, is that of the Cider Mill, and tl the essential circumstance is left entirely in doubt, whether mill was affixed to the freehold or not. My Lords, we k

that there may be a cider-mill that is not affixed to the freehold, for I read in the "Vicar of Wakefield," that when there was a match proposed between one of the Miss Primroses and young farmer Plumstead, Moses said, "I hope that, if my sister "marries young farmer Plumstead, he will lend us his cider-"mill." I take it that the cider-mill there was moveable and was not affixed to the freehold, but might have been carried from the farm of farmer Plumstead to the Vicarage of the Primroses.

Now, my Lords, this was felt to be so strong on the part of the learned and able counsel who argued for the appellants, that they were almost driven to admit that in this case, if the freehold had belonged by hereditary descent to Mr. Dixon, the machinery would have gone to his heir; but they said the land was purchased by him for the purposes of trade, and therefore this introduced a new distinction. It was assumed, that if a great proprietor, such as Lord Londonderry in the county of Durham, were to erect machinery in his coal works, that would go to the heir, and not to the executor; but if a person buys a piece of land for the purposes of a colliery, and erects machinery uponf it, that will make a distinction. My Lords, there is not the slightest authority for any such distinction, and it would be most mischievous if we were at all to sanction the introduction of any such distinction. It would lead to great mischief, and indefinite litigation. There are cases, where, as between partners, when land is used as part of the partnership stock, it is considered as personalty, but in those cases the land itself, the soil, is part of the personalty as well as any machinery erected upon it, and the arguments that were urged in this case by the appellant would lead to the conclusion that all the land that was purchased in fee simple by Mr. Dixon, and belonged to him as long as grass grows and water runs, that all that should be personalty just as much as the machinery that was erected upon it.

My Lords, for these reasons I have no doubt at all that the principle of the decision was perfectly correct.

A distinction was attempted to be made between leasehold and freehold, but when we bear in mind that by the law of Scotland the leasehold is realty and that it goes to the heir, the distinction entirely fails.

I am of opinion, therefore, that the interlocutor must be affirmed. I am very glad, and I think it is creditable to the other side, that they did not for any minute pot-lid or miserable chattel bring a cross appeal; because that would only have involved the case in fresh difficulty and caused unnecessary expense. I therefore entirely agree in the motion of my noble and learned friend, that this interlocutor should be affirmed.

LORD BROUGHAM.—My Lords, I omitted to consider the matter last mentioned by my noble and learned friend from pure inadvertence, namely, as to the leasehold; and also what my noble and learned friend near me adverted to, as to the rule being departed from for the benefit of trade, to which he has given a complete answer. It does not apply to this case in the slightest degree. The argument before Lord Hardwicke was of a totally different description. I only mention this to show that there is no difference of opinion. I omitted it from inadvertence.

Interlocutor affirmed, with costs.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor or judgment, in so far as therein complained of, be affirmed, with costs.

SPOTTISWOODE and ROBERTSON—GRAHAME, MONCRIEFF and WEEMS, Agents.

[10*th July*, 1845.]

ALEXANDER ÆNEAS GRANT, and others, *Appellants.*

COLONEL ALEXANDER FINDLAY and JAMES GARDINER, *Respondents.*

*Ranking and Sale.—Lien.* It is for the Court to consider whether production of the title-deeds of the common debtors' lands will be beneficial to the general body of creditors, real as well as personal, and to order a sale of the lands with or without the production, according as it may be of opinion one way or the other.

WILLIAM MACKINTOSH was proprietor of the lands of Milbank, and others, yielding a free yearly rental of 91*l.* 13*s.* 5*d.*, valued to be worth for sale 2585*l.* 12*s.* 3*d.*, and burdened with heritable debt to the extent of 4400*l.* Macintosh was at the same time indebted in personal debts to the amount of 1599*l.* The first heritable debt was one of 2000*l.*, held by Mackenzie, and the second was one of 1000*l.*, acquired by the respondent, Colonel Findlay, from the original creditor by purchase for 60*l.* The personal debts were composed in part of a business account owing to the appellant Grant, amounting to 843*l.* 4*s.* 7*d.*, and of another similar account owing to Grant's correspondents in Edinburgh, Messrs. Roy and Wood, amounting to 139*l.* 7*s.* 3½*d.*

In the year 1833 Mackenzie executed a conveyance of his estates in favour of the appellant Grant, as trustee for his creditors; but attempts at obtaining preferences having been made, his estates were, in November, 1834, sequestrated under the Bankrupt Act, and Grant was chosen trustee in the sequestration.

In these circumstances the respondent Findlay, in August, 1842, brought a process of ranking and sale of the lands, in

which the usual interlocutor was pronounced, allowing proof of the bankruptcy of the common debtor, the value of the lands, and the burdens affecting them, and granting commission and diligence for recovery of the titles of the lands. Under this commission Grant was cited to produce the title deeds which were in his possession, but he refused to do so, on the ground that they were hypothecated in his hands for the business accounts due to himself and Messrs. Roy and Wood.

The decision of this claim of hypothec was postponed until after the election of a common agent should have taken place. The Lord Ordinary then remitted to the respondent Gardner, the common agent chosen, "to inquire into the facts, and to "report to the Lord Ordinary, *quam primum*, whether the "proceedings can be properly carried on without production of "the title deeds in this process, and how far the want of those "title deeds could be otherwise supplied, and what effect the "non-production of them in this process is likely to have upon "the sale, or the price to be obtained for the lands, keeping in "view the amount of the sums in the said accounts so claimed, "the amount of the heritable and other preferable debts secured "over the estate, and the rights and interests, both of the "heritable and personal creditors, and his opinion as to the "necessity or expediency of admitting the preference claimed "under the said right of hypothec, in order to obtain production "of these title deeds in process."

The common agent reported the facts which have been stated at the outset; and in regard to the title-deeds he reported, that as to one parcel of the lands they consisted of seven instruments, and *ex facie* gave a regular title; that five of them, including the original disposition, had been recorded, and could be supplied by extracts; but the two others, being dispositions, had not been recorded, and could not be supplied. And that as to the other parcel of lands the titles consisted of eleven instruments, which also gave *ex facie* a good title; that seven

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"The customary and regular mode of conducting such of them had been recorded, and could be supplied by extracts, but that the remaining four being all dispositions, and one of them, the original disposition, had not been recorded, and could not be supplied.

And after stating the probable effects of either course of proceeding, ordering the production of the title deeds, or dispensing with it, he further reported that he did not find any express authority requiring the production to be made in every case; but, on the other hand, many of the regulations in the Acts of Sederunt proceeded on the assumption that the title deeds were accessible in the process.

At this stage the respondent Findlay offered, by minute, to guarantee that the sum, reported by the common agent to be the value of the lands, should be offered at the sale, and to consign the amount in the meanwhile.

Upon receiving this report, the Lord Ordinary, considerin the question as one of considerable importance in practice, made *avizandum* with it to the Court, subjoining to his interlocutor the following note:—

"The present process of ranking and sale is brought by a "creditor who holds a *second* security for 1000*l.* over the "chief estate under sale. This security, it is said, he pur- "chased lately for the trifling sum of 60*l.* sterling.

"The property in question is rented at only 90*l.* per "annum, and there are *four* securities on it, extending in all "to 4500*l.* If these be unobjectionable, they will obviously "far more than *exhaust* any probable price to be got for the "lands, and leave no reversion to the personal creditors.

"In this view, the second heritable creditor states that he "does not wish to recover the titles, as, if he took them out of "the hands of the agent unto whom they are *hypothecated*, "the price would be subjected to a deduction, amounting to "nearly 1000*l.* sterling for the law accounts claimed by the "agent. He therefore insists that this ranking and sale shall

" proceed without any *exhibition or examination* of the common " debtor's titles to the subjects under sale.

" This appears to the Lord Ordinary to be a novel and " very questionable form of proceeding. Lord Murray, (acting " for the Lord Ordinary during his indisposition,) very " properly directed the common agent to make a *report* as " to the circumstances of this particular case bearing on the " question. A very distinct report by him accordingly has " been put in, and it is now for the Court to determine " whether they can sustain the motion made by the pursuer, to " allow this process of judicial sale to proceed *without the titles.*

" The general rule is supposed to be clear, that, in a " process of ranking and sale, the title-deeds of the whole " properties under sale must be produced in an early stage of " the cause. The reason for this is well explained by the " common agent in his report, and is manifest on a short " consideration. The titles of the common debtor are abso- " lutely necessary, not merely for the satisfaction of pur- " chasers, but for enabling the common agent and the Court " to adjust the subsequent order of ranking. Till exhibition " of the titles, *non constat* that any of the securities are unob- " jectionable. The titles of the common debtor afford the " only satisfactory means of ascertaining the validity of the " real creditors' security, who pursue a ranking and sale, as, if " there be any flaw in the debtor's title, it may affect every " security that he has granted. Accordingly, it is expressly " provided by the Act of Sederunt, 23d November, 1711, " sec. 3.,—' That, after a process of sale is *raised*, the pursuer " ' shall have diligence granted him *against all havers of the* " ' *writs of the debtor and bankrupt's estate and lands*, to the " ' effect the same may be timeously exhibited in the clerk's " ' hands.'

" The customary and regular mode of conducting such " processes being thus fixed, the next question which occurs " is, whether the pursuer is entitled to make an *exception* of

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"the present case, and to have the sale carried through under "the authority of the Court, *without exhibition of the titles?* "The grounds on which the pursuer has urged this demand "deserve consideration.

"*First*,—He brings into view the *great amount* of the "accounts claimed by Mr. Grant, and alleges that these will "absorb nearly the whole free *balance* left for him as a "secondary creditor. There is reason to think, from the "common agent's report, that the amount of the balance "which the hypothec will cover is considerably exaggerated "by the pursuer. But, be it great or small, it is obvious "that, if the production of titles be dispensed with in the "present case, a similar course must be sanctioned in every "future case where any creditor pursuing a ranking and sale "finds it convenient to ask it. The Lord Ordinary, there-"fore, doubts if a rule of Court, salutary and proper for "the protection of the public, in perhaps nine-tenths of "the cases in which processes of this sort are resorted to, "ought to be departed from, because it may be attended with "some hardship in an isolated case, on the holder of a post-"poned security.

"*Second*,—The pursuer next referred to the case of Bell "against Gordon's trustees, in 1838 (16, Shaw's Reports, "p. 657), in which it was found that a creditor might proceed "to sell subjects *extrajudicially* under a clause of sale in his "bond, without exhibition of the titles, which, as here, were "hypothecated for a large account to intending offerers; and "the pursuer added, that he also had a clause of sale in *his* "bond, under which he could have sold the subjects extra-"judicially. But the reference to that precedent appears to "the Lord Ordinary to afford one of the strongest pleas "against the pursuer in the present case. If he could have "exposed these lands to sale extrajudicially under a special "clause in his bond, why did he not take that course? He "must evidently have supposed that the judicial process of

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" ranking and sale gave him some great and peculiar advan-
" tage; and indeed it is not easy to anticipate or to calculate
" what may be the extent of that advantage. It may be that
" the estate will sell for a fourth, a third, or one-half *more* on
" the title given in a process of ranking and sale than what it
" will fetch when exposed by a bondholder, without a progress
" of writs.

" By the operation of a decree in a ranking and sale, all
" prior incumbrances are wiped off; the grounds of debt, in
" so far as legally preferable, are assigned to the creditors in
" corroboration of their title, and posterior securities are ex-
" tinguished—none of which advantages are obtained in an
" extrajudicial sale by a bondholder; and the short question
" which the Court have to determine is, whether the Court
" will give a creditor the great advantages thus conferred by
" a decree in the process of judicial sale, without a strict
" compliance with all the salutary rules of Court framed for
" the purpose of expiscating the titles both of debtor and
" creditors, and of insuring an ultimate appropriation of the
" price to those whose securities are legally unimpeachable?

" The Lord Ordinary must add, that if the rules of Court
" regulating the forms of this important process are to be
" dispensed with in any case, he has great doubt if a party
" like the pursuer, who confessedly acquired his claim for a
" mere trifle, *after the bankruptcy of the debtor*, should be
" viewed as a creditor entitled to such a boon."

On the 20th July, 1842, the Court pronounced the following interlocutor.

" In respect—1. That the common debtor does not in this
" case appear to state any objection to the non-production of the
" titles: 2. That the titles of the heritable property included in
" the ranking and sale were in the possession of the personal
" creditors, and of the trustee on the sequestrated estate of the
" common debtor, for several years before the said process of
" ranking and sale was instituted, and that they had thus a

"full opportunity of considering the state of the said titles, "and of bringing forward any objections thereto by which the "preferences of the heritable creditors might have been set "aside: 3. That, on the report of the common agent, it ap- "pears that the value of the estate, at the highest computation, "will not pay off the heritable securities affecting the same: "4. That no statement has been made that there exists any "objection to the common debtor's titles by which the personal "creditors could derive any benefit from their production, or "be enabled to reduce any of the heritable securities: 5. That "the effect of ordering production of the titles would in this "case only be to enable the trustee in the sequestration, who "has a hypothec over the same, and who is stated to have a "right of recourse against the personal creditors, as his em- "ployers in the business, for which he holds the titles to be "hypothecated, to obtain payment out of the price of the lands "at the expense of the heritable creditor, who is the pur- "suer of the ranking and sale, and that such result would, in "the circumstances of the case, be unjust to the said pursuer, "Colonel Findlay: 6. That Colonel Findlay has, by a minute "lodged in process, 'guaranteed that the estimated value of "'the lands under sale, mentioned by the common agent in his "'report, being 2585*l.*, should be offered therefore if the same "'are exposed to sale without production of the titles, and that "'the pursuer was willing to consign in the Royal Bank, or in "'such other bank as the Court might appoint, the said sum "'of 2585*l.*, being the amount of the said estimated value, in "'order to secure that a sum to this extent shall be available in "'the ranking:' 7. That, according to the report of the com- "mon agent, it appears that the estimated value of the estate "is not likely ever to pay off the debt to which Colonel Find- "lay is in right; and that, in such circumstances, the pursuer "of the ranking and sale insists that he shall be allowed to pro- "ceed in the process, although the titles are not produced: "And *lastly*, in respect that there is no incompetency in allow-

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" ing the sale to proceed, although the titles are not produced
" —Find it to be unnecessary to pronounce any opinion on th
" general point to which the report of the common agent re
" lates; refuse to pronounce any order for the production o
" the titles of the common debtor; ordain the ranking and sal
" to proceed, and the articles of roup to be framed in suc
" terms as not to imply any obligation to deliver or mak
" forthcoming the titles; reserving, in the event of the estat
" not being sold, to the parties interested again to apply to th
" Lord Ordinary, if they can show that the sale has failed owin
" to the non-production of the titles; and reserving all othe
" questions which may arise after the sale between Colon
" Findlay and the personal creditors."

The cause then proceeded in the usual way, and in the cour of the subsequent proceedings the common agent ascertained th lands to be worth 2894*l.* 10*s.* 9*d.*, at which sum they were or dered to be exposed to sale by an interlocutor of 9th February, 1843.

An appeal was then taken against the interlocutors of the court in the name of Grant in his individual character, and a trustee in the sequestration; of McKenzie, the creditor in th first heritable bond; and of McArthur, one of the persona creditors.

*The Lord Advocate* and *Mr. Turner* appeared for th appellant.

*Mr. Stuart* and *Mr. Anderson* for the respondents.

LORD CAMPBELL.—My Lords, when this case is properl understood, I do not think it is attended with any difficulty.

With regard to the interest of Mr. Grant, as depository o the deeds, I think that he has no *locus standi* whatever, an his counsel very properly admitted that. Indeed, they coul not very properly deny it—and at the same time retain th high degree of credit that belongs to them. As far as he

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the mere depository of the deeds, whether the sale was extra-judicial or judicial is wholly immaterial; and it was decided in the case of Bell *v.* Grant, where there was an extra-judicial sale, that a passive lien, (and this is nothing more,) cannot be set up against the transaction. Then there is Murdo Mackenzie, Esquire, he cannot appear because he has no interest. I cannot help speculating that in Mr. Grant's other capacity as trustee for the creditors, along with Dr. Peter Macarthur, who is one of the personal creditors, they do not care much for their advantage, but they wish to do a good turn for their friend Mr. Grant, and to try to enable him to make active his passive lien. However, here they are, and we must regard Mr. Grant as the trustee for the personal creditors—and we must regard Dr. Peter Macarthur as a personal creditor who interposes in this case.

Now they can have no right to complain of the interlocutor appealed against, unless there be an universal and inflexible rule, that wherever there is a process of ranking and sale, the personal creditors may compel the production of the deeds, so that the depository of the deeds may be paid off, and must be paid off, before the incumbrancers on the land. That is the proposition which has been contended for by the appellants, and it is the only proposition that will enable them to maintain the appeal.

Well, my Lords, we are to consider whether there be such an universal and inflexible rule? There has been no Act of Parliament produced for it, and no decided case. There are passages in books of practice which are perfectly consistent with the notion, that it is optional with those who are interested to demand the production of the deeds or not. It would appear, from what that most learned and excellent judge, so much to be respected, Lord Cunninghame, says, that it has been usual to produce the deeds upon ranking and sale, and I know it will continue to be usual, because, generally speaking, com-

paring the amount of the debt with the value of the propert and considering the damage that would be sustained by the sa of the property without view of the title-deeds, I have no dou it may be the interest of those concerned that the deeds shou be produced, and that the hypothec should be satisfied. Bu however that may be the case, it does not follow that there any rule of law which entitles any creditor to come and insi upon it.

Upon the whole, although there are some reasons adopte in the interlocutor, upon which I think I cannot place re ance, yet there are reasons enough disclosed to induce me come to the conclusion, that the Court was perfectly right refusing the order for the production of the deeds. I thi they had a right to make this reference, to see whether it w for the advantage of the creditors; and, looking to the facts tha are disclosed in the report, it is clear to my mind that it woul not be for the advantage of the creditors.

I need not, my Lords, travel over those facts minutely They show that it is better for the creditors that Mr. Gran should be allowed to retain those deeds, without satisfying h lien upon them, than that, satisfying his lien upon them, h should be called upon to produce the deeds. And that as fa as the real incumbrancers are concerned, it is quite clear th production is not for their advantage.

But it has been urged by the Lord Advocate, and with colou of reason, that the personal creditors have an interest to se whether those securities that appear to be incumbrances upo the real estate can be supported or not. But he has admitte generally speaking, that it must be a very limited and contin gent interest, and of very little value, compared with the interes which the real incumbrancer has, which might be defeated b saying that, upon any speculative notion of a personal credito for the value of forty shillings, he should be entitled to requi that the deeds should be produced, and that the hypothe

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should be satisfied; because it would lead to this monstrous injustice, that, on account of some speculative notion of any personal creditor for a small amount, he may insist in every instance upon the deeds being produced and the hypothec being satisfied, although that hypothec should be of a much larger amount than the whole value of the real estate. That, I think, is contrary to all principles of justice and equity, and I think it would be very inexpedient to lay down such a rule. I think it is much better to leave it discretionary in the Court to say whether the case is made out in each particular instance for calling for the production of the deeds or not. Generally speaking, it will be very easily determined, even without any judicial reference; but if it be doubtful, I think it may be a fit course to pursue to do what has been done here, namely, to refer it to the common agent to state the facts, and to ascertain whether it is for the benefit of the creditors in general that the deeds should be produced and the hypothec satisfied or not; or whether it is more for their advantage that a sale should take place without the deeds even being produced.

For these reasons, my Lords, I think the interlocutor complained of is not liable to the objection made. I will not travel into all the reasons given, for I think there are reasons enough given to support the judgment below, and therefore, my Lords, my humble motion is that the interlocutor be affirmed.

LORD COTTENHAM.—My Lords, if there had been shewn to be an established law in Scotland, that, under the circumstances of this case of ranking and sale, where there are creditors who have a claim upon the land, and others who are merely personal creditors, the Court have no choice, but are compelled, upon the application of the personal creditors, to make an order to pay off the debt and redeem the deeds held by the agent or the attorney as security for the debt, it might not be for this House to overturn a practice and law so proved to exist, however

the House might regret that such a rule was established, because the injury to the creditors, and the sacrifice of property that it would produce, is observable from the state of the figures as they appear upon the report in this case.

It appears that the debts affecting the land amount to 4400*l.*, and the estate is valued at 2585*l.*, and the highest value put upon it by the appellant himself is 2882*l.*; he says he had been offered 2900*l.* for it, but the sum estimated is 2882*l.* So that here is property not worth 3000*l.* only worth 2882*l.*, with debts upon it apparently affecting the land to the amount of 4400*l.*, and the deeds are held by the agent who claims a lien upon them for a debt of 1000*l.*, and this House is called upon to overturn the interlocutor of the Court of Session, and to insist that the deeds should be redeemed, which can only be done by paying this 1000*l.* to the agent before the property is realised, in order to pay the creditors,—that is to say, to redeem an estate charged to nearly double its value you must pay 1000*l.* before you can begin to deal with the property at all. Anything more destructive to the interests of the estate can hardly be suggested than these figures demonstrate.

But then it is said, and it is the only suggestion necessary to be considered, that although these personal creditors, if the real debts are established, have no interest whatever in the property, because there would be evidently nothing left for them, they may possibly succeed by inspection of the title-deeds, in showing that some of these real securities are not valid. A very distant and a very forlorn hope, if by so doing they are to cut down the real security so as to let loose any part of the property for themselves, seeing that can only be done by paying the 1000*l.*, or whatever may be the amount of the agent's demand. Before they can begin this investigation more than one-third of the value of the whole estate is to be thrown away, in order to enable these parties to commence that inquiry.

It turns out there is no authority for this to be produced in the law of Scotland; but that, as one might suppose, the same principle which regulates the practice of Courts of Equity in this country, regulates the practice of the Court of Session. The Court of Session, exercising its jurisdiction in matters of ranking and sale in Scotland, is authorized to adopt such course as appears most beneficial for the interests of those among whom it is administering the property; and the Court of Session has, in this instance, adopted that course. The Court of Session has referred to the agent for the purpose of inquiring into the circumstances, and from these circumstances it clearly appears that, in order to effect the object of the appellant, a great sacrifice of property must take place, and that it is for the interest of all parties concerned, that a sum of money, very nearly equal to the whole estimated value of the estate, which had been tendered by one of the parties concerned, should be taken, unless somebody should bid more. That, at all events, has secured for the benefit of the creditors that the property should not be sacrificed by paying 1000*l.* to a party who cannot enforce it, and whose only security is retaining the title-deeds till some person shall think right to come forward and require the production of them. I should have very much regretted if I had found there was any rule of law in Scotland interfering with this wholesome exercise of discretion. None such has been produced; and I entirely concur in the opinion that has been pronounced by my noble and learned friend, that this interlocutor ought to be affirmed.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

SPOTTISWOODE and ROBERTSON—G. and T. W. WEBSTER, Agents.

[Heard *27th June*, Judgment *11th July*, 1845.]

DAVID STEWART GALBREATH, Esq., *Appellant.*

JAMES ARMOUR, manager of the Campbeltown Gas Company and others, *Respondents.*

*Public Highway.—Property.—Servitude.*—The soil of a public highway continues in the proprietor of the land over which the way has been made, and that although the highway may for forty years have been under the control and superintendence of the general road trustees; and the proprietor is entitled to prevent the opening of the way for the purpose of laying down gas or water pipes.

*Acquiescence.*—The proprietor of the soil of a public highway, allowing certain of the conterminous feuars to break up the way for laying down pipes during a period of ten years, is not thereby precluded from questioning similar acts by other feuars.

THE appellant was superior of the town of Dalintober, the houses in which were held of him under feu dispositions, declaring the boundaries to be the streets of the town, and some of them giving the feuars right to perform certain operations on the sides of the streets, such as making barrels, building boats, and storing wood. The feu contract to one of the respondents in particular, gave him power to conduct water along two of the streets to his distillery. But in none of the charters was there any express right of ish and entry.

In the year 1831, the Campbeltown Gas Company, with leave of the road trustees of the district, broke up two of the streets of Dalintober, and laid down pipes for the conveyance of their gas. In the years 1831, 1833, and 1835, the Company repeated these operations, and in each instance without asking any permission of the appellant, who was resident in the immediate neighbourhood during a great part of the period mentioned.

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In September, 1840, the Company were about to repeat these operations. The appellant, desiring to prevent them, presented a Petition to the Sheriff of Argyle, praying for an interdict against the streets being cut up for any purpose whatever without his consent.

The Sheriff, on the 2nd March, 1841, recalled an interim interdict which he had granted, and dismissed the petition. The appellant presented a note of advocation and interdict to the Court of Session, and on the 28th January, 1842, the Lord Ordinary, (*Cockburn,*) pronounced the following interlocutor, and added to it the subjoined note:

"Advocates the cause, recals the interlocutors complained "of, and decerns in terms of the original petition as restricted: "Finds the advocator entitled to expenses, both in this and in "the inferior Court; appoints an account thereof to be given "in, and when lodged, remits the same to the auditor to tax "and report.

"*Note.*—There are many conceivable and reasonable interests "which may induce a superior to refuse to let his vassals do "what the respondents wish to do. One is, that if cutting open "his ground for gas or water pipes be an accommodation to "them, he may think that they ought to pay for it. Another "is, that he may prefer having gas or water brought into his "village on some general system, subject to his control, rather "than according to the caprice of each individual. But what-"ever his interest may be, *or even supposing he had no interest "in the matter,* still the ordinary rights of proprietorship entitle "him to resist such operations on his ground. If the vassals "be likely to have their houses made less comfortable by not "being allowed the means of introducing water or gas, or any "other accommodation, they have themselves to blame for "taking *bounding* charters without any provision for these lux-"uries. The superior only gave them a right to use the street "or road *for the ordinary purposes of superficial access;* and the

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" Lord Ordinary cannot agree with the Sheriff, that a right t
" cut up the road, and to lay it *permanently* with pipes, can b
" considered as comprehended under the fair or usual uses of
" road of which the *solum* belongs to another."

The respondents reclaimed, and on the 25th of June, 184
the Court, before further answer, ordered the following issue t
be tried before a Jury, in which the appellant was to be defende
and the respondents pursuers.

" Whether; for forty years or upwards, before the 18th
" December, 1840, the main or High-street and George-stree
" in Dalintober, or either of them, were public roads or hig
" ways, and under the control and superintendence of the ro
" trustees, and maintained and repaired by them, and were n
" under the control and superintendence of the defender or h
" authors, and were not maintained or repaired by the sa
" defender or his authors; or whether any parts or portions o
" the said streets, or of either of them, and if any, what parts an
" portions of the said streets, or of either of them, were publi
" roads or highways, managed and repaired as aforesaid?"

This issue was accordingly tried, and on the 23rd March, 1843, the Jury returned a verdict, finding that, for forty years and upwards, specified parts of the streets of the town, being those in question, "were public or highways, and under the " control and superintendence of the road trustees, and main " tained and repaired by them, and were not under the contro " and superintendence of the defender or his authors, an " were not maintained or repaired by the defender or hi " authors."

On the 23rd June, 1843, the Court, in respect of the verdict altered the interlocutor of the Lord Ordinary, and refused th prayer of the original petition. The appeal was against the in terlocutor of the Sheriff, the interlocutors of the Court sendin the issue for trial, and the decree of the Court refusing the praye of the original petition.

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*Mr. Kelly* and *Mr. Anderson* for the Appellant referred to *Ersk.* II. 5. 1, and II. 6. 9.—Tennent *v.* Muter, 9, *S.* & *D.* 586.—Scouller *v.* Robertson, 7, *S.* & *D.* 344.—*Ersk.* II. 9. 34, and II. 9. 13.—*Stair*, II. 1. 5, and II. 7. 10.—Dovaston *v.* Payne, 2 *Smith's Cases*, 94.—Harvie *v.* Rodgers, 3 *Wil.* & *Sh.* 251.—*Bank*, II. 3. 12.—Act 1661, cap. 41.—Turner *v.* Roxburgh, *Kilk.* 252.—Forbes *v.* Forbes, 7 *S.* & *D.* 441.

*The Lord Advocate* and *Mr. A. McNeill* for the Respondents referred to *Bank*, I. 3, 4.—*Ersk.* II. 1. 5. and II. 6. 17.—Act 1661, cap. 41.—1 & 2 *Gul.* IV. cap. 43, sect. 71 & 100.—3 & 4 *Gul.* IV. cap. 46, sect. 110.—Forbes *v.* Forbes, 7 *Sh.* & *D.* 441.

LORD CAMPBELL.—My Lords, this case originates in a petition to the Sheriff of Argyleshire, by the appellant as heritable proprietor of the lands of Ballegrygon. The petition, after stating that the town of Dalintober had been laid out on the said lands, that the feuars had free ish and entry from the streets of the town to their tenements, but that no part of the streets had been granted to any of the feuars, alleged that the respondents, some of whom are feuars under the petitioner, and others represent an unincorporated Gas Company, had resolved to cut into the soil of certain streets in the said town of Dalintober, for the purpose of laying pipes therein for the conveyance of gas and water without his consent, and prayed that they might be interdicted from cutting into or opening any part of the said streets for such a purpose without his consent. The case, therefore, which he made was, that the soil of those streets in the town of Dalintober was his, and that the feuars had no private servitude over them, beyond ish and entry to their tenements, but he allowed that they were highways, over which the public had a right of passage.

The respondents admitted "that at the time when the present "application was presented, they were about to cut open part

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" of the street called George-street, in Dalintober, for the pu
" pose of laying pipes for the conveyance of gas to sever
" houses in the said street, without the consent of the pet
" tioner," but denied that he was entitled to complain of th
act.

It will be material for your Lordships to bear in mind t
nature of the case which the petitioner at first put forward, a
that the interdict prayed for was to be merely prospective, di
turbing nothing that actually existed, whether by right or
wrong.

An interdict was granted by the Sheriff-substitute, but
recalled by order of the Sheriff-depute, on the ground that
the respondents had a right to their feus, with free ish and ent
thereto from the streets, they were entitled to introduce wat
or gas into their respective tenements, by means of pipes laid i
the streets, and that free ish and entry to a man and his famil
extended to free ish and entry of water and gas in the customar
manner in which such commodities are generally introduced.

Upon a process of advocation, after voluminous statement
of facts and pleas in law, Lord Cockburn, as Lord Ordinary
found that the petitioner was entitled to the interdict again
the opening of the soil of the streets for the conveyance of wat
or gas by pipes—he recalled the interdict complained of, an
gave expenses to the advocator, both in the Court of Sessio
and in the superior Court—intimating his opinion in a sho
and pithy note, that the usual rights of proprietorship entitle th
proprietor to resist the threatened operations, for that having,
superior, only given the feuars a right to use the street or roa
for the ordinary purposes of superficial access, a right to c
into the soil and to lay it permanently with pipes, could not
considered as comprehended under the fair or usual uses of
road, of which the *solum* belongs to another.

On a reclaiming note to the Second Division of the Court
Session, for reasons which, (the case not being reported, a

no note being taken of what fell from the learned Judges,) we have been unable to discover, and I for one find great difficulty to conjecture, the following issue was directed, "whether for "forty years, or upwards, before the 18th of December, 1840, "the main or High street, and George street, in Dalintober, "were public roads or highways, and under the control and "superintendence of the road trustees, and maintained and "repaired by them, and were not under the control and super-"intendence of the petitioner or his authors."

A trial accordingly took place, when the Jury found "that "the streets in question, for forty years and upwards, had been "public or highways, and under the control and superintendence "of the road trustees, and maintained and repaired by them, "and were not under the control and superintendence of the "petitioner or his authors, or maintained by them."

Thereupon, the Second Division, (it is said,) without explaining their reasons, as a necessary consequence of the verdict, reversed Lord Cockburn's interlocutor, recalled the interdict, and dismissed the petition, with costs.

The present appeal to your Lordships is against this last interlocutor of the Court of Session. In my humble opinion, my Lords, this interlocutor ought to be reversed, and that of Lord Cockburn affirmed.

In the first place, it is quite clear that the soil of these streets is in the appellant, and that he has all the rights of proprietor over the soil of them, unless in as far as the soil may be taken from him, or his rights may be impaired, by the consideration that they are and have been above forty years public highways, under the control and superintendence of the road trustees for the county of Argyle. The deeds produced are sufficient evidence of his title; and, in truth, it cannot be contested by the feuars, who claim under grants stating that title, and describing tenements bounded on those streets as the property of the author of the appellant, and giving limited servitude over these very streets.

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The threatened act of opening the soil and laying gas-pipes would no doubt *prima facie* be a sufficient foundation for an application for an interdict by the owner of the soil; I, therefore, now proceed to examine the different pleas on which it is resisted.

The first is that, by the law of Scotland, the soil of all highways is in the Crown. Let us observe to what an extent this proposition goes. Carriage-roads, horse-roads, and footpaths are equally public roads; and whether the use of them has existed further back than can be traced, or they have been established by uninterrupted use for more than forty years immediately before the time when the controversy respecting them arises. It comes to this, then, that if a proprietor for the accommodation of the public suffers a public road for horses, carriages or foot-passengers, to be established over his land, the property of the space which the road traverses is gone from him and his heirs, from the centre to the sky, so that he loses all the herbage there may be upon the surface of it, with all the minerals under it, and he cannot connect the different parts of his intersected property by a tunnel under it, or by a bridge over it. It is curious, in a feudal point of view, likewise, to consider where and how the fee is supposed to be transferred.

But I am happy to think, my Lords, that there is no sufficient authority in the law of Scotland for a proposition so absurd and inconvenient. When the text writers cited upon this point are examined, it will be found that they mean no more than that highways are *res publicæ*—that there is a public servitude over them—that they are called "the king's highways" in Scotland, as they are in England, because the public, represented by the sovereign, have a right to use them, and that any *perpresture* or nuisance upon them is a public offence, for which the offender may be prosecuted and punished, leaving the soil, subject to the public servitude, to remain in the private proprietor. The highway belongs to the king; but what is the definition of a high-

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way?—Not the soil, over which the public have a right of passage. We are told by our books that a highway may be either a footway, a horseway, or a cartway, and is a right of passage in general to all the king's subjects, without distinction, see 1st Institute, 56. This right of passage may well be said to belong to the king, although the soil over which it is exercised belongs to a private individual.

The case of Forbes *v.* Forbes, whether rightly or wrongly decided, does not touch this question, as all that was debated there was the extent of the public servitude, not the right to the soil. Lord Glenlee's inaccurate expression, that "the soil occupied "by a public road belongs to the public," he himself immediately corrects and explains by adding, in the same breath, most accurately, "and they may make such use of it as may be neces- "sary for the purposes of the public."

The soil in public harbours, in public navigable rivers, and in the sea-shore, was originally in the Crown, and is now in the Crown, or in the grantees of the Crown; not so the soil of highways, which was originally in the owner of the adjoining land. There may be particular highways in Scotland, the soil of which is in the Crown; but I must express my clear opinion that, by the law of Scotland, as well as by the law of England, the soil of the public highways is presumed to be in the conterminus proprietors, and that if a public highway is established by usage over the land of another, the soil is still his, with all his former rights, subject to the public servitude which he has suffered to be established. The simple fact, therefore, that these streets are public highways, is no answer to the application.

But main stress is laid upon the fact found by the jury, that these streets were not only public highways, but for forty years were under the control and superintendence of the road trustees.

Now it is contended, that at all events the soil of all public roads under the control and superintendence of the road trustees is in the road trustees, and therefore, that the soil of these roads

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must be out of the appellant. Upon this reasoning the inst seems to have been directed, and the final judgment pronounc by the second division of the Court. But there is no expre enactment to transfer the soil, and surely the transfer of the so is not necessarily implied by conferring a right of control an superintendence to insure the enjoyment of the servitud There are expressions in Highway Acts applicable to Scotlan which have been drawn by inferior practitioners of the law in bued with the vulgar notion that the soil of public highwa belongs to the king, or the trustees. These being adopted the legislature would certainly be evidence of the law, if it w doubtful; but the law before, having been clear and explic they are wholly insufficient to alter it. There is no dispute that i England the soil of highways is in the conterminous proprieto who may bring ejectments against any one who takes possessio of any part of the highway adjoining his land, and may maintai an action of trespass for any injury done to it beyond what i connected with the public right of passage over it (see the case collected, 3 *Burn's Justice,* 511). Nor does it make any differ ence for this purpose, whether the road is under a Turnpike Ac or not, for the soil does not vest in the turnpike trustees unles there be a special clause for that purpose. Davison *v.* Gill, 1 *East* 69; Rex *v.* Mersey Navigation, 9 *Barnwell* and *Cresswell,* 95.

Yet there are Acts of Parliament applicable to England ex actly like those relied upon with respect to Scotland, from whic it might be inferred that in England the soil of all highways i in the Crown, or in the road trustees. By the General High way Act, 13 Geo. III., c. 78, s. 17, it is enacted, that "where an "such new highways shall be made as aforesaid, the old highwa "shall be stopped up, and the land and soil thereof shall be sol "by the said surveyor to some person or persons whose land "adjoin thereto, if he, she, or they shall be willing to purchase th "same; if not, to some other person or persons for the full valu "thereof." And by the 55 Geo. III., c. 68, which was passe

" to amend 13 Geo. III., respecting the turning or diverting a " public highway," it is enacted by section 4, " that from and " after the enrolment of such order and certificate, such old high- " way, bridleway, or footway shall be stopped up, and the soil of " such old highway or bridleway sold in the manner prescribed " by 13 Geo. III., c. 78, s. 17." My Lords, both those acts are repealed by 5 and 6 Wm. IV., c. 50, and the absurdity being discovered, the new enactments give no power of selling the old highways.

If trustees buy lands, buildings, or other heritable subjects, the property of these will be in the trustees, but such a power to buy will not give them the property in lands, buildings, or heritable subjects, which they have never bought.

It is said, however, that the right of the trustees to control and superintend takes away the right of the appellant to complain of the act of laying the gas-pipes in the soil of the streets, even if the soil is still his.

On the same reasoning, my Lords, if there were minerals under the streets, the property of the appellant, it might equally be contended that he could not apply for an interdict against persons threatening to bore for them, and to carry them away. The power of control and superintendence with a view to the public enjoying the right of way, leaves all the rights of the owner of the soil, subject to the right of way, entirely untouched.

Then, my Lords, reliance is placed on Stat. 3 and 4 Wm. IV., cap. 46, by which authority is given to trustees of roads, and magistrates of royal burghs, to authorize the opening of roads and streets for laying pipes, and conveying water or gas; but the judgment of the Court of Session does not in the remotest degree proceed on the ground that any such power was ever exercised in this case, for the appellant positively denies the fact; and the only use that can be made of the statute is to show that the soil, or the right of complaining of an injury to

it, is taken out of the proprietor. This, my Lords, is, like a power of control and superintendence, to be exercised subj to the paramount rights of the owner of the soil.

If I hold a field, subject to a right to A. to license perso to dig clay from it, I may surely treat as trespassers those w shall dig clay from it without any license.

It seems to me, therefore, my Lords, that the issue w wholly useless, and that the case now stands, as it did before t Sheriff of Argyle, to be determined by a just construction of t feu grants.

If the servitude granted impliedly embraces the right open the soil, and lay water and gas-pipes, the interlocutor the Sheriff recalling the interdict, ought to be supported. B my Lords, I clearly think that the just view of this point i taken by Lord Cockburn. The grants show that the land w to be laid out as a town, and impliedly the feuars have *ish* a *entry* to their tenements from the streets; but how does thi *ish* and *entry* infer a right to open the soil of the streets, and t lay down iron pipes, which would become a part of this fre hold. Such a doctrine would entirely destroy all the rules a distinctions respecting servitudes. Breaking the streets to l pipes is never thought of in England, except under the author of the legislature. Our different gas companies and wat companies are established by act of parliament, with a pow on certain conditions, to open the streets, and lay down pipes.

By a very salutary general statute, the 3rd and 4th Wm. I the necessity for such private acts is obviated in Scotland but the respondents, instead of availing themselves of th statute, have persisted in an expensive and useless litigation.

Another objection made on behalf of the respondents w that the petitioner had improperly denied that these stree were highways, which had been forty years under the superi tendence of the trustees; and that this fact being found again him by the jury, he is not at liberty now to make a cas

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consistent with the fact, of their having been such highways. But he could not appeal against the issue; and although he would have done much better to have admitted that they were such highways, which inevitably follows from their having been streets, and the existence of a public Act of Parliament, placing all highways in the county of Argyle under the superintendence of the trustees, he cannot be prejudiced by an immaterial self-evident fact having been found against him. The case originally made by his petition was, that the places, in which the trespasses complained of were committed, were public streets in Dalintober; and "a common street," and a "king's way," though formerly distinguished, are now equally considered public ways. That is so ruled in 1 *Strange*, 44.

I have now, my Lords, to conclude with considering the only question on which I have entertained any doubt, whether the appellant has not by acquiescence precluded himself from resorting to the remedy of an interdict. The result of the statements of the opposite parties upon this part of the case seems to me to be, that in 1831, 1833, and 1835, certain pipes had been laid in the streets of Dalintober without the permission of the appellant being asked, but with his knowledge, and that he made no complaint of them till December, 1840. Such knowledge and acquiescence I think would effectually bar the appellant from seeking to disturb existing enjoyment by interdict; and for what had been done before, if it was wrongful, although all remedy would not be gone, he must proceed by another form of action to try the right, and to obtain compensation. But because A., B., and C., in the town of Dalintober have laid pipes in the streets to bring gas to their houses, may not the appellant seek to prevent entirely different parties, X., Y., and Z., from doing the same? If the Act was unlawful, is it so far sanctioned by custom that a stranger cannot in this form be challenged for doing it? What passed between the appellant and other feuars is *res inter alios acta*.

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However, the case of the gas company is mentioned; and it is said that they being allowed to lay down a main, should not be prevented from laying down service pipes to all the houses in Dalintober. My Lords, the gas company, as such, have here no *locus standi*, there is no privity nor connexion between them and the appellants; they can only be regarded as the servants and agents of the feuars, and they can be in no better situation than their principals. It cannot be said that the respondents, who are feuars, have been put to any expense or any additional inconvenience by the laying of pipes in the streets having been allowed to others, and then suddenly forbidden to themselves.

Although a remainder man had lain by for a time, and allowed timber to be felled by the tenant for life, I apprehend that he might still apply for an injunction against cutting more; and that if the purchaser were included in the application it would not be refused, on the ground that he, expecting a great fall of timber, had provided many horses and carts to carry it away.

The interdict, in my opinion, is entirely prospective, and, therefore, the appellant has done nothing to prevent him from applying for it. In truth, acquiescence was no ingredient in the judgment. The mere right was tried, and if the interlocutor stands the appellant would be without remedy in any shape. After such an interlocutor upon such a verdict, and the *rationes decedendi* expressed in the interlocutor, I rather conceive that the result would not be the same as if the petition had been simply dismissed on the ground of acquiescence; but that upon an affirmance of the interlocutor *res judicata* might be pleaded to any other action. But this point seems to me at present immaterial, as I am of opinion that there is no sufficient ground for the plea of acquiescence.

As to the conduct of the appellant we have no means of judging, and no right to judge. We can only look to the strict rights of the parties.

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Upon the whole, my Lords, I am of opinion that the pellant was entitled to apply for this interdict; and I, there-e, beg leave to move your Lordships, that the interlocutor pealed against be reversed, and that of Lord Cockburn be irmed.

LORD BROUGHAM.—My Lords, agreeing, as I entirely do, the view which my noble and learned friend has just taken of is case, a case of very considerable importance in my opinion, will be unnecessary for me to trouble your Lordships at great ngth in stating my opinion, and the grounds upon which it sts.

In the first place, I have to observe that the issue, which was rected in this case, is to me a matter of some astonishment. I o not profess to understand the grounds upon which that issue as directed; I do not profess to comprehend the frame of that ue at all. I hold that, upon every view of the case, the mat-er of fact directed to be investigated by the trial of that issue s wholly immaterial. No doubt whatever this land was bur-dened with a servitude; no doubt whatever this land, as far as gards the rights of the public, the right of way over it, had en so used; but whether for forty years, or forty centuries, or for four years, does not signify, because it is admitted on all hands that the public had that right of way.

Then what did the issue direct itself to? It directed itself to ying that which was admitted; namely, whether, in one parti-ular view the title of the public over this land was founded well r not, because it did not even go to try the question, as I un-erstand it, whether the public had that right, but it went to try he question of the foundation of that right, namely, the prescrip-ion, the forty years' use of it, which is enough for the servitude f course. But admitting that the public had the right of way, e it owing to long possession, or be it by express abandonment f the owner of the ground to the public, or by any positive grant,

that is quite immaterial; whether the public had that right way or not was no part of the question in the case; the questi was, whether, having that right of way, it followed that t public, by mere possession of an easement, had the ownera of the soil.

It is also very material to consider that, in putting th question to the jury, there was not a word said of acquiescenc I could much more easily have understood sending an issue t try the point of fact of acquiescence or no acquiescence, becau if there had been acquiescence proved in a clear and legitima manner, a great deal of light would have been thrown upon th right in this case conjoined with the other right. The posse sion of the easement was really no matter of dispute betwe the parties.

It is not immaterial to consider that their Lordships did n direct any issue to the point of acquiescence on this groun that it tends most demonstratively to show what my noble a learned friend has already pointed out, that acquiescence form no part whatsoever of the ground for the judgment below, if it had formed any part of the ground of that judgment, th most undeniably ought to have sent it to be tried as a matter fact upon the issue, instead of having a fruitless matter of f tried upon one ground, and one ground only, and that one whi was not disputed, namely, the public right to the highway.

Then we get this point whereupon to rest our foot in t outset, that the public highway is admitted. Now it seem clearly, as my noble and learned friend has stated, to have be only upon the ground of the finding of the verdict on that issu that the judgment was pronounced. What was it? Why, th their Lordships thought that the only issue was the right way, and that if the public had a highway right they had t soil; because, instantly that the issue was found in one dire tion, namely, on behalf of the public, the judgment was pr nounced. It was supposed to be a necessary consequence, i it were the consequence in law of the finding upon the issue.

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Let us then see whether that is the legitimate consequence of that admission, which I take to be an admission proved by the verdict upon an issue unnecessarily tried, namely, that the public had a right of way. A highway must, according to the law of Scotland, be totally different from a highway according to the law of England. But, it must be clearly admitted, to follow from the right of a highway being vested in the public, that the soil thereby is vested in the public, else this judgment cannot stand. Is it so? Is there that wide difference, or rather contrast, between the laws of the two countries in this respect, namely, that in England it is barely an easement, and that in Scotland it is not merely a servitude or easement, but it is a right to the soil? My Lords, I see no authority whatever for holding that that is the law of Scotland. The cases clearly do not prove it. The reference made to the statutes does not prove it; and I can see no difference whatever, upon looking into either the text writers or the cases, and nothing to impeach the inference drawn from both in the statutes, (of which a word presently,) to show that there is a different view taken of the conflicting rights of the public and of the owner of the soil in Scotland, from that which is taken in England.

When it is said, as it is in the books, and in some of the cases, that a highway is in the public, or in the trustees on behalf of the public, or in the Crown for the benefit of the public, what is it that really is so? *Ex vi termini:* we are not to take "highway" to mean that, which it is often used to mean, by the ordinary confusion of language in common parlance, where, in this case, as in many others, you confound the thing with the use of the thing. You talk of a "reading," and sometimes confound it with a book. You talk of a "drawing," and sometimes confound it with the paper upon which the drawing has been made. We have here to consider it in the legal, strict, and technical sense of the word. Then "highway"

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what is it? It is known to the law of Scotland; and it known to the Civil law, from which it was borrowed into th law of Scotland, that there are three kinds of way:—there i the *iter*, there is the *actus*, and there is the *via*. What is th *iter?* The road from London to York is very often called *iter Iter* would be very often used by an historian; but when jurist makes use of the word *iter* it means an easement, a righ of passing along another man's close on foot, and no more There is the *iter* without having the right of driving a horse The *actus* gave you the right to drive a horse or a cart withou cattle; and the *via*, the highway, is a general phrase for th whole: it included *iter* and *actus*, and the right also to tak wains or carts drawn by cattle. It was the *nomen generis*, th most general term of the whole, and included the other mino ones. Every one of those is an easement, and only describe the right to use the surface in respect of that right of easement but in common parlance you talk of an *iter* as meaning th high road, the body of the road. You talk of *actus* not so muc as meaning the body of the road as the right of going over i and you talk of *via* very commonly as meaning the body of th road; yet when a lawyer comes to consider them, whatever common person might do, he considers them to be mere words expressive of the various forms of that servitude easement. This, therefore, shows distinctly, (and I have enter into it for the purpose of explaining it more clearly,) that y are to take the word *highway*, when you speak as a lawyer, in different sense from that in which you take it when you use as in common parlance.

Then it is said that there is an expression of Lord Glenl and that has been relied upon, I see, in quoting it in anoth case. But I think a great step has been taken towards t explanation of it, and to show that his Lordship really had t right sense of the word when he came to unfold it more clear My noble and learned friend referred very justly, in fairness

that most able and learned judge, to what follows almost immediately afterwards; for, if you take those words by themselves, they certainly do seem to import that he considered the soil to be in the party having the easement.

Then, my Lords, it is said, that various Acts of Parliament have dealt in Scotland with the subject as if they assumed that the soil was in those of the public who have the easement. A complete answer to that has been given, a more complete one cannot be given, than to show that if that proves anything it will prove a great deal too much; for it will prove that in England, where no man doubts this point, the soil belongs to those having the easement, namely, the king or the public; because in the first General Highway Act of the year 1773, and in the second General Highway Act of the year 1805, the road, not only the right of way but the public road, the *corpus ipsum* of the road, was dealt with as if it belonged to the public, *a centro usque ad cœlum*, and as if the public had the right and not the conterminus proprietor or proprietors. That was discovered and set right in the year 1835 or 1836 in the existing Highway Act, which omits, and most properly omits, that erroneous clause.

I believe two sources may be pointed out as having been the origin of that erroneous law. The one is, that in many cases there is a property in a highway just as there is in a railroad. A railway company buys the road, buys the soil, buys it out and out, and they are the owners of the soil—they have done a great deal more than merely buy the easement. So, in many cases it may have happened that highways have been bought, and have not been the property of the owner of the conterminus lands. But I believe a more likely source than this was oversight. I think, generally speaking, it was an oversight in those who framed those Acts. In private Acts and in local Acts we have frequently seen it existing, and in those cases it very often is owing partly to the first of those

causes, namely, there having been a purchase, and partly to the second of those causes, there having been an oversight. And I am inclined to think, upon the whole, that that unintelligible clause, (for so to a lawyer it must appear to be, the English law not being doubted upon the subject,) crept into the 13th of George the Third, and the 55th of George the Third, the two General Highway Acts passed in 1773 and 1805, owing more to an error than to the few instances, (for they are comparatively few,) of purchase of the soil.

My Lords, I observe a very great slowness in those who maintain the other side of the question, to follow it to its consequences. If the consequences are legitimate, then there cannot be a clearer matter than this, that he who will have the proposition, cannot repudiate its consequences—if the consequence is absurd, he gets rid of a great argument against himself, by a capricious and arbitrary use of the proposition; but he shall not be allowed so to use it. If so, the most evident truths in mathematics would cease to be true, because a man might say "I only say so and so, I do not go the length of saying so and "so."—Aye, but you must go the length, because if you say so and so, you must say so and so, too. But he would be very well pleased if he could get rid of the consequence.—And so I have often observed with respect to the old demonstration *ad absurdum,* upon which some of the most certain propositions in Euclid rest; among others, one of the most evident of all, which the geometricians used to laugh at, because they said it was plain to asses—I mean that two sides of a triangle are greater than the third side. They said, "An ass knows that, he would "rather go across than go round." "Oh no," said Euclid, "I "must lay it down; it is part of my general system."—And that proposition is proved *ad absurdum*—and so are many others of the most certain propositions. According to the mode of reasoning with which I am dealing, people would very easily assert the most absurd propositions—things evident even to asses they

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would deny, because they would say, "Oh! I only say so and "so, but I do not say so and so." No, no,—you must take the consequence of your proposition—*Qui vult antecedentem, non debet nolle id quod consequitur.*—And so I say here.

Now, observe how that applies. I find the greatest slowness in those learned persons who maintain the other side, to follow it out to its consequences, namely, that if the soil of a highway belongs *ad centrum* to the public, a man having a highway running through his ground, could not mine under it below the surface. In Northumberland, for instance, Lord Londonderry or Mr. Lambton could not mine under the surface, but he must sink another pit on the other side of the road, because if he had sunk a pit on the east side of the road he could not drive his gallery from east to west under the road. It is perfectly self-evident that that is the inevitable consequence of this doctrine that a man who has driven a pit in his close upon the east side of the road, both sides of the road belonging to him, if he has not the property of the road is bound to sink another pit on the west side, and he is a trespasser if he touches an atom of the coal, or of the sub-soil perpendicularly under the road.—That is evident, and those who maintain the one proposition, must clearly buckle to the consequences and maintain the other.

My Lords, it is not necessary for me to detain your Lordships further. I have dwelt a little longer upon this than I should otherwise have done, on account of the unfortunate circumstance of our not all quite agreeing upon the subject. That being the case, I have thought it necessary to give my opinion at greater length than I otherwise should have done. And so viewing the case, I most cordially agree with my noble and learned friend, and give my concurrence and support to his proposition.

LORD COTTENHAM.—My Lords, I am of opinion that the interlocutor appealed from ought to be affirmed. I consider

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this a case of great importance as it involves questions affecting public highways throughout Scotland, and the principles upon which the equitable jurisdiction in matters of interdict is in future to be administered in that country.

If the judgment of the Court be reversed and the interdict be restored, this House will establish that by the law of Scotland any owner of land, adjoining a street or public highway in towns, may prevent the opening of the street for the purpose of laying down pipes for the conveyance of water or gas, or for any other purpose required by the inhabitants, without his consent —that is, without paying to him such a consideration as he may think proper to require as the price of his permission; and consequently, that the trustees of the roads have no power to give permission, or themselves to open the roads or streets for such purposes, except as such rights and powers may be affected or given by some recent Acts.

The great distinction between private rights of way or roads by servitude and the public highways, is strongly marked by all the authorities from the earliest time down to the present, and is most essential to be kept in view in considering the claim raised by the appellant. If duly considered, it will reconcile the apparently discordant opinion of the Sheriff Substitute and Lord Cockburn on the one side, and of the Sheriff Depute, Lord Gillies, and the Inner House on the other.

The appellant, indeed, was well aware of this distinction, for he, throughout, maintained, that in the street in question the feuars had only a right of way by servitude. His petition so states his title; and this seems to have been assumed by the Sheriff Substitute and by Lord Cockburn, and the real state of the case was only ascertained by the verdict upon the issue.

If the state of the case had been as the appellant stated it the interdict would have been matter of course; because any party, entitled to a mere right of way by servitude, could only have such right of passage as the enjoyment proved, and no

question could arise as to the powers of road trustees or other functionaries, in whom the jurisdiction over the public highways is by the law of Scotland vested. The interdict assumes that there is no such right in the road trustees, for the fact of their consent having been obtained is a fact controverted between the parties; and if the right of the plaintiff had depended upon the absence of consent by the road trustees, no interdict could be granted until the fact had been ascertained. The interdict assumes that the fact is immaterial, and that whether they consented or not the plaintiff has a right to restrain the future progress of the works.

The Inner House, seeing the importance of the distinction, directed an issue to try this fact controverted between the parties, and the result has been to ascertain that the street in question is a public highway and under the jurisdiction of the road trustees. Upon that being so ascertained, the Court of Session seems to have considered it as conclusive against the claim of the appellant.

Two questions arise upon this state of circumstances. First, In whom is the soil of a public highway in Scotland? And secondly, Does a proprietor, dedicating a portion of his land to the public as a highway, merely grant a right of passage to all persons, which would be only giving to all the same right which individuals have in rights of way by servitude? Or have the road trustees and other public functionaries such a power and jurisdiction over the soil as entitles them to open it when the interest of the public requires it? For if they have such a power, the appellant cannot be entitled to an interdict.

That road trustees have a larger power than persons entitled to a right of way by servitude cannot be disputed. It is not denied that they may break the soil for purposes of improving the road by raising or lowering the level, making drains, &c. But it is answered that these are objects connected with the right of passage. The existence of the power, however, marks

the distinction between public and private ways, and shows that in dedicating a portion of land as a highway to the public, more is granted than the mere right of passage; and this being so, the question will be as to the extent of the grant, and whether it does not devote to the public and submit to the jurisdiction of the public functionaries all such power over, and interest in, the highway, as the public interests including the objects in dispute may require. A question quite independent of the title to the soil and the minerals which may be under it, as to which there are no doubt great difficulties, arising from the principles which regulate the titles to landed property in Scotland, and from the authorities which are to be found upon this subject, but it appears to me quite immaterial to attempt to solve these difficulties. If the soil be in the Crown, there would indeed be a short end of the appellant's case; but if it be in him, it appears to me that his title to interfere with the use of the soil for the purposes contemplated will not be advanced by his establishing a title to the soil, it appearing to me evident, from the authorities, that the Crown, and through the Crown the road trustees, have right and power over public highways sufficient to enable them to permit the surface to be opened for such purposes as those in question; and consequently, that the original proprietor of the soil has no right to the interposition of the Court by interdict to prevent such works being carried into effect.

This will, I think, clearly appear from text writers, decided cases, and the recognition of various acts of parliament.

Craig says, I. 16. 10., "*Via publica solum est publicum.*"

Stair says, I. 4. 7., "Highways belong to the King."

Bankton says, in I. 3. 4., "Things public are those which "belong as property to the Sovereign, as rivers, harbours, and "highways; but of the banks of a river the use is public, but the "property belongs to the owner of the adjoining ground." And again, he says, in II. 1. 5., "Highways are the King's, and inter

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"*Regalia*, as encroachments upon them, as likewise upon the "streets of Royal burghs and public rivers, is purprision."

Erskine, II. 6. 17., says, "Since the introduction of feus, "rivers, free-ports, and highways are *inter Regalia* and *in* "*patrimonio principis*."

Bell, in his Principles, sect. 638 and 659, says, "Highways "are vested in the Crown; a public road is capable of extension "with a change in the mode of travelling, but a road by servi- "tude is strictly limited to the extent of the possession."

This was the point decided in Forbes *v.* Forbes, in 7 Shaw and Dunlop, 441. where Lord Glenlee says, "I cannot help thinking "that there is a difference between a public road and that of "one claimed as a right of servitude by the proprietor of "a dominant tenement. The soil occupied by a public road "belongs to the public, not to the proprietor of the ground "over which it passes, and they may make such use of it as "may be necessary for the purposes of the public." All the other Judges concurred.

In Miller *v.* Swinton, in *Morrison* 13, 527, it was found that the public streets in a burgh belong to the Crown.

In the road acts in Scotland no enactment is found giving power over the soil, but there are various provisions which assume it. In two modern Acts, particularly the 1st and 2d of Will. IV., cap. 43, sec. 32, the trustees are authorized to erect toll-bars, houses, and gardens, and the property is declared to be in them. By sec. 61 the trustees are authorized to widen roads to 20 feet without any payment, and to 40 feet making compensation. In sec. 67, lands taken for the purpose of the roads are declared to be the property of the trustees. By sec. 71, roads and toll-houses becoming useless are to be sold. Sec. 86 assumes the power of the trustees to widen and lower the roads. Sec. 100 assumes power in the trustees to give leave to lay water and gas pipes; and provides that if the road shall be opened with the leave of the trustees or others

having authority so to do, for the laying of pipes for water, gas, tunnels, or railroads, or for any other purposes, the soil shall be replaced.

Again, in the 3d and 4th Will. IV., cap. 46, sec. 110, the Commissioners of Police are authorized to apply by petition to the road trustees for leave to open the streets "for laying pipes "for water or gas, or making sewers or drains, or for any other "purposes which road trustees shall grant the necessary "warrant for that purpose." The right and power is assumed to reside in the trustees alone, for no application is required to the supposed owner of the soil.

We find then these authorities stating that the soil of a public road belongs to the public, to the Crown,—not as the banks of a river, the *use* of which is for the public, but the *soil* of which belongs to the owner of the adjoining land; that highways, but not private ways, may be extended as to extent and use as occasion may require, and that such uses may be made of highways as may be necessary for the purposes of the public; and we find public acts, and particularly the 1st and 2d Will. IV., cap. 43, sec. 100; and 3d and 4th Will. IV., cap. 110, recognising the rights of road trustees over the soil so much as to treat it as vested in them, enabling them to convey it when no longer wanted for the public, and above all referring to the particular acts sought by the appellant to be restrained, and making the consent of the road trustees alone, without any reference to the supposed owner of the soil, sufficient for the purpose of opening streets for the purpose of laying pipes for water and gas.

How far these authorities may be sufficient to show the nature and extent of the powers of road trustees over public highways it is not necessary for the present purpose to consider. The question is, do they leave it quite clear that they have no power to permit the opening of the soil for the purpose of laying pipes for the public service of water or gas; and do they leave it

quite clear that the owner of the adjoining soil has a right to prevent that being done? for if the right so claimed by them be even doubtful, he cannot, in the present state of the question, be entitled to the interdict he asks.

He has no suit to establish his right, but merely a petition asking for an interdict founded upon an assumed title. He is, therefore, applying solely to the equitable jurisdiction of the Court, and although the same Courts in Scotland administer the equitable and the legal jurisdiction, they must, when exercising the one, be regulated by the principles applicable to that particular province. Neither from the papers, nor from the argument, have we been furnished with authorities showing how far the equitable jurisdiction of the Scotch Courts is regulated by the principles which have long been established in this country. But as the principles of equity are of universal application, I cannot suppose that such rules would be considered as inapplicable where not opposed to any contrary practice or decision in Scotland.

The granting the interdict under the circumstances of this case would be contrary to many of the best established rules which regulate Courts of Equity in this country.

First, when a party applies for an injunction founded upon an alleged legal title, though the Court will sometimes, to secure the property in the mean time, grant an interim injunction, it always makes the ultimate decision depend upon the establishment of the legal title, as in the case of Roberts' copyright, &c., Kinder *v.* Jones, 17 *Vesey*, 110, Norway *v.* Rowe, 19 *Vesey*, 147; and in those cases we have Lord Eldon's authority for saying, that if the legal title be denied, the Court will not grant an injunction. In this case, the plaintiff, by his petition, rests his case upon the alleged right of the owner of the soil in the ground under a road by servitude: a title not only denied, but disproved by the verdict of the jury, by which it is proved that if he have any right it is one of a totally different character, namely, the right

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of the owner of adjoining land to the soil of a public highway. And this opens another objection to the interdict; for it is a rule, in this country at least—

Secondly, that a party who seeks an injunction *ex-parte*, as was the case here, upon one title or state of circumstances, shall not be permitted to maintain it upon another title, or under different circumstances.

Thirdly, in this country formerly courts of equity refused to grant injunctions in cases of trespass. This rule has been relaxed, but it is seldom done except in cases of irreparable mischief, and never in cases in which the injury from the injunction might be greater than that from the act sought to be restrained. Upon which principle I acted in the case of the Attorney General *v.* the Mayor of Liverpool, reported in 1st *Mylne* and *Craig*, 171. In the present case, the injury to the plaintiff from laying the service-pipes would be nothing, the power of the Court over the use of them continuing, and being capable of execution if the right of the appellant should be established.

But, Fourthly, no court of equity ought to restrain the further progress of works of the commencement and progress of which the party applying was cognizant, and of which he made no complaint. In such cases, the party carrying on the works obtains an equity against the equity of the party complaining. For it would be manifestly unjust for any one to permit others to proceed under a supposed right, and incur expenditure on works founded upon such supposed right, and then to assert a title opposed to it, and seek by injunction to restrain the further progress of the works, which without completion would be useless. Upon this principle I refused an injunction in the case of Greenhalgh *v.* the Manchester Railway Company, in 3rd *Mylne* and *Craig*, 788.

In the present case the appellant attempts to deny knowledge of the progress of the works which commenced many years ago, but the most important part of which was laying the main

pipes through the very streets in which the houses of the respondent are situate, and from which main pipes it is now sought to lay service pipes to such houses. I think he has totally failed in negativing the case of knowledge and acquiescence charged; but that is not essential, because if the title to the interdict rested upon that, the Court would have adopted some course of ascertaining the fact, before they would have granted an interdict, which would not be proper if such knowledge and acquiescence existed, there being in fact no evidence but assertion against assertion, although the situation of the property, and the residence of the appellant, throws every degree of probability upon the side of the respondent's statement.

If the interdict of Lord Cockburn be restored under the present state of circumstances, it will be negativing the right of the public functionaries in towns to open the soil of the street for the purpose of laying pipes for water and gas, and will establish in the supposed owner of the soil the right of refusing or of extorting the purchase of such benefit,—a right of, at all events, great doubt. And it will be an interdict asked for upon an alleged title proved by the verdict to be false, and ultimately resting upon a title different from that originally made. It will be an interdict to restrain a trespass from which no indirect injury can arise, without any means taken to try an important legal right, upon which the title to the interdict depends; and after an acquiescence in the progress of the works the completion of which is interdicted, either proved or shown to be very probable, without any means taken to ascertain the fact. The works are said to be the works of the Gas Company, and not of the feuars. That is quite immaterial. If the company were permitted to complete the works, the interdict against the feuars will be useless.

The interdict sought to be now obtained, is sought under circumstances very different from those which existed when the case was before Lord Cockburn, and would I think be subver-

sive of many of the best established rules of equity, by which courts are regulated in such cases.

LORD CAMPBELL.—Of course, my Lords, I do not intend to make a single observation on what has fallen from my noble and learned friend who has last addressed you, but by way of explanation I merely beg, that it may not be supposed that I am of opinion that the trustees or the magistrates of Royal burghs have not the power, under the 3rd and 4th of William the 4th, if proper application is made to them, to grant a license to open streets, or highways, for the purpose of laying gas-pipes, or water-pipes. I think that they have that power, and I think that their exercise of that power is perfectly consistent with the interlocutor in question being reversed.

LORD COTTENHAM.—My Lords, of course, I am not going to argue this question, but, in answer to the last observation of my noble and learned friend, I would observe, that I referred to that Act, because that Act does not profess to give the power, but assumes the power to exist.

Ordered and adjudged, that the Interlocutors, so far as complained of in the Appeal, be reversed with costs in the Court below. And it is further ordered and adjudged, that the cause be remitted back to the Court of Session in Scotland, with directions to that Court to adhere to the interlocutor of the Lord Ordinary in the said cause, dated the 28th January 1842, recited in the Appeal, and further to do therein as shall be just and consistent with this direction and judgment.

GRAHAME, MONCRIEFF, and WEEMS—D. CALDWELL, Agents.

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## LORD CHANCELLOR,

LORD LYNDHURST,

SUCCEEDED BY

LORD COTTENHAM,

*July*, 1846.

## ATTORNEY GENERAL,

SIR FREDERICK THESIGER,

SUCCEEDED BY

SIR JOHN JERVIS,

*July*, 1846.

## SOLICITOR GENERAL,

SIR FITZROY KELLY,

SUCCEEDED BY

DAVID DUNDAS, ESQ.,

*July*, 1846.

## LORD ADVOCATE,

DUNCAN M'NEILL, ESQ.,

SUCCEEDED BY

ANDREW RUTHERFORD, ESQ.,

*July*, 1846.

## SOLICITOR GENERAL,

ADAM ANDERSON, ESQ.,

SUCCEEDED BY

THOMAS MAITLAND, ESQ.,

*July*, 1846.

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# CASES

DECIDED IN

# THE HOUSE OF LORDS

ON

# PPEAL FROM THE COURTS OF SCOTLAND.

9° & 10° Victoriæ,

Session of Parliament 1846.

VOL. V.

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REPORTED BY

SYDNEY S. BELL,

OF LINCOLN'S INN, BARRISTER AT LAW.

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By Appointment of the House of Lords.

LLIAM BLACKWOOD AND SONS, EDINBURGH;
SAUNDERS AND BENNING, LONDON.
1846.

JURISDICTION.

1. The Court of Session, in a reduction of a service as heir, has jurisdiction to reduce or sustain the verdict of the jury in the service, upon the evidence which was before the jury, or to call for additional evidence if it think fit. Mc Lean *v.* Officers of State, Scotland . . . . . 60

2. The Sheriff at common law has power to grant a warrant of open doors, and the Small Debt Act, although, in prescribing the forms by which its provisions are to be carried into effect, it omits the form of such a warrant, does not impair the original jurisdiction to grant the warrant. Scott *v.* Letham . . . 126

LOCALITY. See *Res Judicata.*

LOCAL RAILWAY ACTS. See *Statutes,* 1.

MORTIFICATION.

A gift by a deed, in the form of a contract between the donor and a college, whereby the donor granted to the college, for the maintenance of bursars in a specified manner, lands, the rents of which, at the time, were inadequate for the purpose intended, under a condition for re-entry in case of non-performance; and whereby the college, as superior of the lands, released the donor from past and future feu duties, is a gift of the lands to the college for its own use absolutely, subject to the maintenance of the bursars in the condition and in no better condition than that specified, although the lands may have so improved in value as that the rents have become more than adequate for that purpose. Jack *v.* Burnett 409

OBLIGATION. See *Warrandice.*

ONEROUS OR GRATUITOUS. See *Revocation,* 1.

PARLIAMENT POWERS. See *Property* and also *Public Works,* 1 & 2.

PART AND PERTINENT. See *Tailzie,* 1.

PAYMENT INTO COURT. See *Consignation.*

PAYMENT. See *Debtor and Creditor.*

PRESCRIPTION.

Absence from the kingdom on service as a common sailor in the Royal Navy—the service commencing by impressment—is not sufficient, *non valentia agere,* to elide the long prescription of forty years, pleaded in defence to an action for reduction of a conveyance of lands. Graham *v.* Watt . . . 172

PROPERTY.

Where parliamentary powers have been given for the construction of works, in a particular locality, with a power of deviation, and to purchase the lands requisite, if the power has been once exercised, but not to the extent of the limits allowed, it is exhausted, and

EXPENSES.

Where the appeal was against an interlocutor of a majority of the Court below, obtained by one of the Judges withdrawing his vote, no costs, in exception to the general rule, were given at dismissing the appeal. Maule *v.* Moncrieffe . . . . 333

FACULTY.

Found that a faculty, reserved in a marriage settlement, which directed the trustees of the settlement to execute an entail of lands upon the issue male and female of the marriage, whom failing to such persons and uses as should be named and appointed by the wife, in any deed of settlement or writing executed by her, during the subsistence of the marriage, or after its desolution by the *death* of the husband, was well executed by an absolute disposition, not containing any reference to the faculty, and made after the dissolution of the marriage by the *divorce* of the husband. Cunninghame *v.* Mc Leod . 210

See also *Entail* 2, 3 and 4.

FIAR AND LIFERENTER.

In ascertaining the free rents of lands, in order to fix the amount of a widow's annuity, the fiar of the lands is not entitled to deduct a proportional part, either of the expense of maintaining an embankment against the encroachments of a river, paid by himself, and not forming a deduction from the rent payable by the tenant of the lands; of the expense of repairs upon the parish church; or of the amount of a factor's fee. Mc Pherson *v.* Mc Pherson . . . . . 280

2. In ascertaining the amount of a liferentrix's provision out of the rents of lands, credit must be given for the money annually received by the fiar from third parties, for the right of shooting game upon the lands; and for the rent obtained for the home-farm, although "the mansion-house, and policies, and enclosures "thereto belonging," were excepted from the provision. S. C.

3. An annuity given to his widow by an heir of entail, under a power in the entail to provide wives in a liferent infeftment, not exceeding three-fourths of the free rents of the lands, is to be a fixed annuity, calculated according to the amount of the rents in the year in which the heir granting the annuity died; not one varying, *de anno in annum*, according to the amount of the rents actually received. S. C.

4. A widow's annuity, given by her contract of marriage, in exercise of a power in an entail to provide widows, and in the form of an obligation upon the husband, "and the heirs of entail succeeding "ing to him in the tailzied estate," is payable, not only out of the lands actually entailed, but out of personal estate held by the trustees of the entailer's will, upon trust to be invested in the purchase of lands to be entailed, and out of lands purchased, but not entailed, in the lifetime of the maker of the provision. S. C.

GAME. See *Fiar and Liferenter*, 2.

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1. The Court of Session, in a reduction of a service as heir, has jurisdiction to reduce or sustain the verdict of the jury in the service, upon the evidence which was before the jury, or to call for additional evidence if it think fit. McLean *v.* Officers of State, Scotland . . . . . 60

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Where parliamentary powers have been given for the construction of works, in a particular locality, with a power of deviation, and to purchase the lands requisite, if the power has been once exercised, but not to the extent of the limits allowed, it is exhausted, and

ROPERTY—*continued.*
it is not competent again to resort to the power, for the purpose of enlarging the works to the extent of the limits allowed, and for that purpose to require an additional sale of land from the adjacent proprietor. Maule *v.* Moncrieffe . . 333

ROVISIONS TO HEIRS. See *Fiar and Liferenter*, 1, 2 & 3.

UBLIC WORKS.
When an Act authorizes the construction of a work, according to specified plans, and in a specified position, and gives a power of deviating to a fixed distance from that position, if a position has once been adopted, the power to deviate cannot afterwards be resorted to, so as, in fact, to create an extension of the works. Maule *v.* Moncrieffe . . . . . 333

2. Where plans of projected works are referred to, and adopted by the statute authorizing their construction, these plans are to be looked at, in order to construe the general powers given by the statute, in regard to the nature, extent, and position of the works. S. C.

See also *Property*.

AILWAY ACT, 8th and 9th Vict., cap. 33.
If a proposed deviation of the level of a railway be within five feet of the original level, calculated with reference to the *datum* line in the plans deposited under the standing orders of either House of Parliament, the deviation will be within the power of deviation allowed by this statute, although it should exceed five feet, calculated with reference to the *surface*-level shown upon the plans. North British Railway Company *v.* Tod . . . 184

EAL AND PERSONAL. See *Warrandice*.

ECORDS. See *Deeds*.

ES JUDICATA.
A decree, in a process of augmentation and locality of stipend, whereby the lands of individual heritors were declared not to be liable in payment of stipend, as being held *cum decimis inclusis*, which had been consented to by the common agent, was *found* to be binding upon the general body of heritors, though the consent was not given with their express authority. Earl of Hopetoun *v.* Ramsay . . . . . 69

EVOCATION.
1. Where the lands of a woman are, by the settlement upon her marriage, limited to the issue of the marriage, and failing such issue, to her "nearest heirs-at-law," it is in the power of the woman, after dissolution of the marriage, by divorce, without issue, to convey the lands away from her heirs-at-law, as not being parties having an onerous claim under the settlement. Cunninghame *v.* Mc Leod . . . . . 210

REVOCATION—*continued.*

2. A trust settlement conveyed the whole of the granter's estate to trustees for specified purposes. A posterior settlement likewise conveyed the whole estate to a different set of trustees, and for different purposes; but omitted, in regard to a particular estate, to give a power of sale, which was necessary for carrying the trusts into effect, and revoked all prior deeds, "in so far as the "same may be inconsistent with these presents." A former judgment of the House having declared that the trustees of the second deed had not power to sell the estate, or perform the trusts in regard to it. *Held* that the first deed was not revoked by the second, but subsisted to the exclusion of the heirs-at-law of the granter claiming this estate in that character, as undisposed of. Allan *v.* Glasgow . . . . . 379

SALE.

Where a purchase, generally without specification, of an heir's whole interest in the estate, real and personal, of a testator, was made and carried out by a deed, reciting that the accounts and particulars of the estate had been examined by the purchaser, it was *held* that no inquiry could be gone into, in regard to portions of the real estate having been previously sold by trustees in the management of the estate, for the general purposes of such management, whereby the land was reduced as alleged, below what the purchaser had expected, the purchase not having been of any ascertained quantity. Robertson *v.* Pattinson . 259

SERVICE OF HEIRS.

Where the Court is divided in opinion as to the value of the evidence upon which a jury have given their verdict at serving a party heir, it should rather submit the matter to another jury, than give its own judgment upon the evidence setting aside the verdict and reducing the service. Mc Lean *v.* Officers of State, Scotland . . . . . 60

See also *Jurisdiction*, 1.

SHERIFF. See *Jurisdiction*, 2.

SMALL DEBT ACT, 1st Vict., cap. 41. See *Jurisdiction*, 2.

STATUTE.

1. Where, of two proposed constructions of a statute, one would work great inconvenience, and the other very little, a Court is entitled to bring to its aid the balance of convenience, in endeavouring to fix upon the construction which should be adopted. Risk *v.* Muir . . . . . 14

2. Where the inhabitants of a burgh were exempted by statute from the payment of river dues upon their goods, provided they

STATUTE—*continued.*

gave proof and made affidavit of the property, if required, *found* that under the terms of the statute, the giving of evidence and making affidavit were conditions precedent to the exemption, without which the goods were entitled to pass duty free, leaving the right to the duty to be afterwards ascertained. S. C.

STATUTES.

1. In construing the powers given by a local statute, plans exhibited, or notices given, prior to the passing of the statute, are to be disregarded, except in so far as they may have been incorporated into, or made part of the Act. Terms of clause held not to amount to such incorporation. North British Railway Co. *v.* Tod . . . . . 184
2. In construing local acts, with reference to plans deposited under the standing orders of either House of Parliament, these orders must be put wholly out of the question. S. C.

TAILZIE.

1. In order to make an entail duly registered, so as to be binding against creditors, of lands, which had originally been acquired as a separate tenement, it is necessary either that the entail embrace them by name, or that they be shown to have been actually possessed as part and pertinent of other specific lands, *nominatim* embraced by the entail, for the prescriptive period prior to the making of the entail; and for the purpose of showing such possession, the mere fact of possession of other contiguous lands upon titles, with part and pertinent, and a statement, in the titles made up from time to time, that the lands, alleged to have been possessed as part and pertinent, were embraced by the entail, was not held sufficient. Earl of Stair *v.* King . 82
2. Contravention of an entail cannot be declared by an action, not brought until after the death of the contravener. Maxwell *v.* Maxwell . . . . . 165

See also *Fiar and Liferenter*, 4.

TRUST.

It is not competent to award out of a charity fund compensation to a party entitled to the benefit of the charity, in respect of his having been deprived of that benefit by the erroneous acts of the trustees for administering the charity. Heriot's Hospital *v.* Ross . . . . . 37

See also *Fiar and Liferenter*, 4.

See also *Mortification*.

See also *Revocation*.

VERDICT. See *Service of Heirs*.

WARRANDICE.

An obligation of warrandice in a charter; against augmentations of stipend, although not a personal obligation, which will transmit to the executors of the grantee in the charter, will not vest in a successor of the grantee, because of his proprietorship of the lands, without any evidence of its transmission to him, along with the lands. Marquis of Breadalbane *v.* Sinclair . . 353

WRITS. See *Deeds.*

# CASES

## DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

## COURTS OF SCOTLAND.

1846.

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[19*th February*, 1846.]

LACHLAND MACINTOSH, S.S.C., *Appellant.*

EDWARD BRIERLY, residing in Paisley, *Respondent.*

*Debtor and Creditor.—Payment.—Bankruptcy.—Act* 1696, *Cap.* 5.—A letter by a debtor to a third party, directing him to pay the debtor's creditor a sum certain out of a larger fund, which the third party was about to receive on account of the debtor, with an undertaking by the third party upon the letter that he would do what was directed, followed by actual receipt of the fund and by a partial payment by the third party to the debtor, operate, from the time of the fund being received by the third party, as payment by the debtor to the creditor, and to the extent of such constructive payment the fund will not be affected, under 2 and 3 Vict. cap. 41, by the bankruptcy of the debtor within sixty days of the date of the order; and the order will not be open to challenge under the statute 1696, cap. 5, as an illegal preference.

HALLIWELL and Son had contracted with a railway company to construct a portion of their line of way;—disputes arose about the performance of the contract, which gave rise to a suspension and interdict at the instance of Halliwell and Son against the company. This proceeding terminated in a refer-

ence to an arbiter of the matters in dispute between the parties. In the meanwhile several arrestments were used in the hands of the railway company by creditors of Halliwell and Son, and the appellant and respondent who were likewise their creditors, were in a condition to have adopted the same measure. On the 14th April, 1842, Halliwell and Son drew their bill on the railway company. in favour of the appellant, who was the solicitor of Halliwell and Son, for 1000*l.*, as a fund for payment of his own debt, and that of the other creditors, The railway company refused to accept the draft, and it was protested for non-acceptance.

On the 16th April, the arbiter issued his award that the railway company should be at liberty to retain in their possession all the materials brought upon the railway by Halliwell and Son, on making payment to that firm of 1011*l.*, all arrestments being previously loosed.

In these circumstances, on the 29th April, 1842, a meeting of the respondent and other creditors of Halliwell and Son, took place in the chambers of the appellant; at this meeting the appellant was instructed to remove the arrestments, and get up the money owing by the railway company. On the same day Halliwell and Son wrote the following letter to the appellant:—"Sir

"We have adjusted the claim due by us to Mr. Edward Brierl

"contractor, near Bishopstone, at the sum of two hundr

"pounds sterling, and arranged that you should pay him t

"amount out of the proceeds of our draft, of date 14th A

"current, in your favour, on the Glasgow, Paisley, Kilmarn

"and Ayr Railway Company, for 1000*l.* You will, ther

"please to pay him accordingly, for which this shall be

"warrant, besides that the said bill was intended to e

"Mr. Brierly's claim when granted." The appellant at the bottom of this letter: "*Edinburgh*, 29*th April*

"I hold the above duly intimated to me, and shall dul

"the same."

MACINTOSH v. BRIERLY.—19th February, 1846.

It did not appear whether this letter was written at the meeting which, as has been mentioned, took place on the day of its date, nor what was done with it after it was written, nor how Brierly became cognisant of it.—The pleadings contained no averments on either side, in regard to any of these particulars, and no evidence was led by either party; neither did it appear, further than might be inferred from the circumstances, in what character the appellant had acted in the matter. He averred that he acted as solicitor for Halliwell and Son, and on his own behalf as one of their creditors, having an interest to see their matters properly arranged; while the respondent averred that the appellant had been consulted by him, and had advised and acted for him in the matter, as his solicitor, which the appellant as positively denied.

On the 24th May, 1842, the railway company paid the appellant 900*l.*, to account of their debt to Halliwell and Son; and on the same day, as stated in the defences, the appellant "at the sight of James Halliwell," one of the partners, paid the respondent 50*l.* to account of his debt. On the 4th June, 1842, the estates of Halliwell and Son were sequestrated, and thereafter the appellant, on the demand of the trustee under the sequestration, paid over to him 225*l.* 11*s.* 5*d.*, as the balance of the 900*l.* remaining in his hands, after deducting the debt due to himself, the 50*l.* paid to the respondent, and payments made by him to other creditors of Halliwell and Son. In answer to subsequent applications, made to him by the respondent, for payment of 150*l.* the remainder of the 200*l.*, the appellant referred him to the trustee under Halliwell's sequestration.

In these circumstances the respondent brought an action against the appellant for payment of 150*l.*, on the footing that the letter of 29th April, 1842, and the appellant's writing upon it, amounted to an obligation upon the latter to pay him the sum mentioned in the letter, so soon as it should have been received.

MACINTOSH *v.* BRIERLY.—19th February, 1846.

The appellant pleaded in defence:—

" 1*mo*, As Halliwell and Son do not admit there is any sum " due to the pursuer, there are no grounds in point of fact on " which he can insist on the payment concluded for in this " action.

" 2*do*, If the pursuer possesses any well-founded claim, as " set forth in this action, he is bound to make good the same in " the process of sequestration.

" 3*tio*, In the circumstance before stated, the defender was " justified and bound to pay over the sum in his hands at the " date of the sequestration to the trustee.

" 4*to*, The alleged order or draft on the defender not being " stamped, is null on the stamp laws."

The Lord Ordinary, (*Cockburn*,) pronounced the following interlocutor, and added the subjoined note:—

" Sustains the 2d and 3d defences, and dismisses the " action, reserving to the pursuer to make his claim in the " sequestration, and decerns."

" *Note*.—The Lord Ordinary does not consider the 900*l*. as " having actually *passed out of the property* of Halliwell, and " been lodged with the defender, as partly belonging to the " pursuer. He thinks that the meaning, and the law of the " arrangement was, that the sum was merely placed with the " defender as money *belonging to Halliwell, but on which the* " *pursuer had a claim*, which claim the defender was to satisfy. " The defender accordingly paid the pursuer 50*l*.; but within six " days after the *money* had been lodged with him, Halliwell was " *sequestrated;* and before any farther payment was made, the " trustee claimed the whole balance. The Lord Ordinary " thinks that it was the defender's duty to give up the balance " to the trustee, as a sum belonging to the bankrupt, though " subject to claims; and that how clear soever the pursuer's " right to be paid preferably may be, it is before the trustee " that this right must be asserted. This would have been the

MACINTOSH *v.* BRIERLY.—19th February, 1846.

" case had there even been an arrestment, (Gordon, 12th Janu-
" ary, 1842,) but what occurs here is a mere unsecured claim."

The respondent reclaimed; and on the 1st June, 1843, the Court pronounced the following interlocutor:—

" Alter the interlocutor of the Lord Ordinary complained
" of. Find that it is sufficiently instructed that the defender
" received and held the sum of 200*l.* paid to him on the 24th
" May, 1842, for behoof and on account of the pursuer, and
" was accountable to the pursuer for the same, from the date
" on which he received it. Find that no question can com-
" petently be raised on this record as to the validity of this
" transaction under the bankrupt statutes; therefore, repel the
" 2d and 3d defences; and having farther heard parties on the
" cause, repel the 4th defence. Find that there remains no
" other matter on the record which can raise any defence against
" the action; therefore, repel the whole defences. Find that the
" defender is bound to pay the sum of 150*l.* concluded for in the
" summons, with the legal interest thereof from the 24th day of
" May, 1842, and decern."

The appeal was against the interlocutor of the Court.

*Mr. Turner* and *Mr. Anderson* for the Appellant.—There is no undertaking to pay other than what is adjected to the order of 29th April; but Brierly was neither party nor privy to that document, there is no evidence that he was even aware of its existence; so far as he is concerned, it is a mere order by a debtor to a third party, to pay his creditor when in funds, with an undertaking by the party to comply with the order. There was no privity, therefore, between Macintosh and Brierly, nor any contract between them which could entitle the latter to sue the former. It was open at any time to Halliwell and Son to have countermanded the order upon Macintosh, and the latter was bound to obey the countermand so long as he was free from any engagement with Brierly. Williams *v.* Everett,

MACINTOSH *v.* BRIERLY.—19th February, 1846.

14 *East*, 582; Walwyn *v.* Coutts, 3 *Mer.* 707; Garrard *v.* Lauderdale, 3 *Sim.* 1; Payan *v.* Eaton, 2 *S. & D.* 117.

Even if the respondent could be held to have any right under the order of April, that document did not make any specific appropriation of the money to be received—at the utmost it created a mere general charge upon the fund—that did not divest the right of Halliwell and Son. The effect of the sequestration of their estates was to vest this right under the sequestration, subject, no doubt, to the charge so created; 2 & 3 Vict., c. 41. sec. 78. The sequestration, therefore, put an end to all right of action previously competent to the respondent, and the only course which then remained open to him was to make his charge effectual by a claim under the sequestration. Lindsay *v.* Paterson, 2 *D. B. & M.* 1373; Gordon *v.* Miller, 4 *D. B. & M.* 352.

[*Lord Cottenham.*—Neither of these were cases of appropriation.]

Not exactly, but they were cases of preferential right, which the present is no more.

But if the order of 29th April and the appellant's undertaking annexed, should be held to have conveyed to the respondent a right to the debt owing from the railway company to the extent of 200*l.*, as the estates of Halliwell and Son were sequestrated on the 4th June following, within sixty days of the date of the order, it will be void under the Act 1696, cap. 5, as a voluntary assignation in preference to other creditors. Campbell *v.* Mc Gibbon, *Mor.* 1139; Robertson *v.* Ogilvie, *Mor. App. voce*, B. of Exchange, No. 6; Spier *v.* Dunlop, 5 *S. & D.* 680; Dawson *v.* Lauder, 2 *D. B. & M.* 525; White *v.* Briggs, 5 *B. M. D. & Y.* 1148.

Any claim upon the order is further void under 55 Geo. III., c. 184, as it is an order for the payment of a sum out of a particular fund, and if it was delivered to the appellant, as the trustee of the respondent, which the Judges below held to

have been the case, then it was delivered to some person on behalf of the payee, and under the statute is null for want of a proper stamp being affixed to it. Ernly *v.* Collins, 6 *Mau. & Sel.* 144; and Braybrook *v.* Meredith, 13 *Sim.* 271.

*Lord Cottenham*, in the course of the argument, interrupted counsel to ask how they could maintain that the letter had been delivered to Macintosh on behalf of the respondent, without necessarily destroying the first branch of their argument altogether? The argument on this head received so little countenance from the House, that the counsel for the respondent were desired to disregard it in their address.

*Mr. Attorney-General* and *Mr. Bethel* for the Respondent.—Being in a matter of trade, the order of 29th April, with the appellant's undertaking upon it, coupled with the subsequent payment of 50*l.* by the appellant to the respondent, is sufficient to establish an agreement between Halliwell and Son, the appellant and the respondent. The money was not in the appellant's hands at the date of this agreement, and, but for his undertaking to pay it over, the respondent might, by arrestment against Halliwell and Son, have prevented the appellant from receiving it. If what took place amounted to an agreement, then, from the moment that the appellant received the money, the respondent was, in fact, paid his debt. The appellant thenceforth held the money as the money of the respondent, and Halliwell and Son ceased to have any right in or controul over it. In Everett *v.* Williams the money was already in the hands of the bankers, who not only had not undertaken to pay as the debtor directed, but had refused to do so; and in Walwyn *v.* Coutts, and Garrard *v.* Lauderdale, the deeds in question were for the benefit of creditors executing them; but in neither case had the party seeking the benefit of the deed executed it: none of these cases, therefore, has any application to the present. If the respondent be right upon this ground,

there is an end of any argument upon the effect of the sequestration under 2 & 3 Vict. The 78 sect. transfers the estate of the bankrupt; but the money received by the appellant had ceased to be any part of that estate, and had become the property of the respondent.

With regard to the Act 1696, no question whatever was raised upon it in the Court below, nor even in the printed papers upon the table. But, if necessary to argue the point, there is no case in which a present payment, in the ordinary course of trade, either of money or of bills treated as money, or which by efflux of time have become money, had been overreached by that statute. The Act is directed against voluntary dispositions or assignations; here there was neither, but an order for actual payment, which was completed so soon as Macintosh received the money. Neither was what took place voluntary; the respondent had it in his power to use arrestments against the Halliwells, the effect of which might have been very detrimental to them. The order for payment was the price they paid to be liberated from this hazard. In this view the statute is further inapplicable on another ground, that the order was made upon a new consideration. The railway company were not ordered by the arbiter to pay to Halliwell and Son, and deliver their effects to them, but upon the condition of the arrestments used in their hands being previously loosed. The respondent was in a condition to use arrestments, and the consideration for his refraining from doing so was this order for payment. In every view, therefore, the transaction comes under one and all of the exceptions to the application of the statute stated, 2 *Bell's Com.* But even were it otherwise, however competent it might be to the trustee or creditors under the sequestration to raise a challenge on this ground, it cannot lie in the mouth of the appellant, who has neither title nor interest to maintain it.

MACINTOSH *v.* BRIERLY.—19th February, 1846.

LORD COTTENHAM.—My Lords, the question which has been principally argued at the bar is one upon which we have heard no opinion expressed by the learned Judges in the Court below, and for this reason, that they were of opinion the proceedings and the pleadings did not raise it. Now, on examining those proceedings, it appears to me that they were perfectly correct in that view of the case.

The pursuer founds his claim upon a transaction that took place between a person of whom he was originally the creditor, Mr. Halliwell, and a Mr. Macintosh, who was the solicitor and agent of Halliwell and himself. And he states, that there being a sum of money due to Halliwell from a railway company, and he and others pressing Halliwell for payment of their debts, it was arranged that Macintosh should receive the monies due to Halliwell from the railway company, and when received, should pay the amount claimed out of those monies. These instructions were reduced into writing, and Macintosh, upon receiving those instructions, underwrote the paper with these words, "I "hold the above duly intimated to me, and shall duly honour the "same." The money was received; 900*l.* was received from the railway company. Out of that 900*l.* Macintosh paid 50*l.* to the pursuer, in pursuance of the undertaking to pay 200*l.*; and the present claim is against Macintosh under this undertaking to pay the remaining 150*l.* Subsequently to this undertaking, and subsequently to the receipt of the money, and subsequently to everything being completed which constituted the plaintiff's claim, as against Macintosh, Halliwell became a bankrupt. Now, the summons has simply stated these transactions as far as they lead to the undertaking by Macintosh.

The defence set up to this was that which has by no means been the subject of argument at the bar of this House; it did not enter into the question of the plaintiff's right at all, but it merely raised a question as to the person to whom he was to look for payment; it stated that the sequestration having issued

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before the money was actually paid, Macintosh was bound to account for it to the trustee under the sequestration; and that the plaintiff, therefore, if he had any claim, must look to the proceedings under the sequestration for payment; not raising any question as to the legality of the pursuer's claim, but disputing his right to go against Macintosh and telling him that the effect of the sequestration is this: that whatever claim he may have he is bound to go in under the sequestration and make it good there; leaving the question whether he had any claim or not, and the ground now insisted upon in resistance to his claim, totally untouched, not raised by the pleadings at all, nor the state of the law at all referred to upon which this claim is now resisted.

Now the Lord Ordinary was of opinion that the defender was so far right, that the claim ought to have been made under the sequestration, and he disposed of the case upon that ground. When it came into the Inner House, the Judges were of opinion that that was a mistake, and that whether the plaintiff's right as against Macintosh, was one in which he might or might not succeed, as against Macintosh, he was not bound to go in under the sequestration; and they were of opinion that Macintosh's liability was not affected by that provision of the Statute of the present Queen, by which, in certain cases, the proceedings are to be under sequestration, the whole property being invested in the trustee, subject to such claims as there might exist against the bankrupt himself. And so we have no opinion whatever from the Judges upon the point which has been so much argued.

I think that this alone is quite sufficient to dispose of the case, because I think that the Judges were quite correct, and that as against Macintosh, the defences have not set up the ground upon which he now insists. But, my Lords, the case has been so much argued upon that ground, (upon which my opinion is also very clear,) that it perhaps might not be satisfactory if the case were disposed of without adverting shortly to it, namely:

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that this transaction is altogether void under the provisions of the Statute 1696.

Now the transaction is simply this: that the debtor having a fund due to him, authorizes a person to receive the amount of money so due, and out of the proceeds to pay the debt due from him; and that agent undertakes the duty and actually receives the money; and then it is said, the undertaking by which the agent contracts to pay that money, when it shall be received, is not binding upon him, because the person to whom the debt was originally due, became bankrupt after the agent had received the money; but before he had in point of fact carried into effect the contract which he had entered into; that is to say, that this is not a transaction which, upon the money being received, brings into operation his contract and gives to the person for whose benefit he had entered into that contract, a right, as against him, to demand its performance.

My Lords, many authorities have been referred to in the course of the argument, but not one which appears to me to have the slightest application to the present case. It is admitted, that if the party had himself received the money and paid the debt, there would have been an end of the case. He sends an agent to receive it. That agent does receive it, and that agent has previously acknowledged that upon the receipt, he would pay it over to the plaintiff. Is he not, therefore, liable to pay it over to the plaintiff? Whether he chooses to keep the money in his own hands or not, the event has happened under which he agreed to pay 200*l.* to the pursuer. He had that money in his hands, and he therefore had that money as the property of the plaintiff. The event has taken place upon which his contract was made to depend; he had it for the plaintiff, and he was bound to pay it over to the plaintiff; and it was as much severed from the bankrupt's estate, and became as much the money of the pursuer as if the person who originally owed it had paid it over to the pursuer.

This is the view I have taken of this transaction. I have waited to see whether any case could be produced, of a decision in the law of Scotland, at all impeaching the obvious and natural result of the transaction, as stated in these proceedings. No such case has been produced. Those cases which have been produced, refer to transactions which are very distinguishable from the present; and there are none which raise so extraordinary a proposition as this: that a transaction not impeached for fraud, or for any improper motive, a transaction in which a man is to pay a debt which he justly owes, is to be affected by a transaction subsequent to the completion of it; that is say, subsequent to the events happening which are to perfect the right of the pursuer to receive the money which has been so contracted for. In the absence of any authority, I must assume that there is none; and I should be sorry if in the result of the investigation it had appeared that the law of Scotland went to sanction a proposition so totally inconsistent with, and so fatal to, the security of the ordinary transactions of mankind, as that a transaction like this, so completed, was liable to be overturned by a subsequent sequestration issuing. No such authority having been produced, if we are to decide this question upon the merits which I own are not raised upon the pleadings, I should be of opinion upon that ground also, that the judgment of the Court of Session is correct.

LORD BROUGHAM.—My Lords, having been absent elsewhere on judicial business during part of the argument, I should not have taken any part in the consideration of this case, but that I entirely agree with my noble and learned friend, and my other noble and learned friend who is about to address your Lordships, in holding that the Court below have well decided both points.

My Lords, I certainly did, when I came back the other day, expect from what took place at the bar, that some authorities

would have been produced, and I rather put off the case upon that expectation. However, nothing has been so produced, and I should have been a little surprised if there had been. I do not see how a mercantile country could go on at all, if such could be the effect of a subsequent sequestration; and therefore I am not in the least surprised that no authorities were produced. Indeed I should have been surprised if there had been. I think the case is perfectly clear.

LORD CAMPBELL.—My Lords, I continue to entertain the opinion which I at first had after I had carefully examined the facts of this case: that the result in point of law is the same as if Halliwell had received with his own hand the money from the railway company, and had paid that money, or 200*l.* of that money, into the hands of Brierly; because the result in point of law, seems to me to be precisely the same. Macintosh went to receive that money, and received it as the agent of Brierly. It was Brierly's money, from the time he received it, and the subsequent sequestration could have no effect at all to carry that money under the sequestration, any more than if it had come into Brierly's own hand.

My Lords, I regret that this case should have occupied so much time, but we have always a duty to perform here. It is our duty to know what is to be said on both sides. I have listened with great attention to the argument, and notwithstanding all that has been urged, my opinion continues what it was when I originally understood the case. I have no doubt whatever that the interlocutor should be affirmed and with costs.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

[17*th March*, 1846.]

WILLIAM RISK, Wine Merchant, Dumbarton, *Appellant.*

WILLIAM MUIR, Collector of Tonnage Dues at Glasgow, and the Secretaries of the Trustees for improving the navigation of the River Clyde, *Respondents.*

*Statute.*—Where, of two proposed constructions of a statute, one would work great inconvenience and the other very little, a Court is entitled to bring to its aid the balance of convenience in endeavouring to fix upon the construction which should be adopted.

*Ibid.*—Where the inhabitants of a burgh were exempted by statute from the payment of river dues upon their goods, provided they gave proof and made affidavit of the property, if required, *found* that, under the terms of the statute, the giving of evidence and making affidavit were conditions precedent to the exemption, without which the goods were not entitled to be passed duty free leaving the right to the duty to be afterwards ascertained.

THE respondents were the officers of a public body of trustees, empowered by Acts of Parliament to improve the navigation of the river Clyde, and to levy tonnage dues on all vessels and cargoes passing along the river, as a fund for defraying the expense of the improvements.

The first statute appointing the trustees was the 6th George IV. cap. 117.—By that statute the trustees were empowered to levy a certain rate of dues. The next statute was the 3d and 4th Vict. cap. 118.—That Act enlarged the powers of the trustees, altered the rates of dues leviable by them, and gave them power, in case of refusal of payment, to seize the goods or the tackle of the ships liable, and sell them judicially for payment.

Previous to the passing of either of these statutes, the burgesses of Dumbarton enjoyed an exemption from the payment of any river dues, in respect of a contract made in the

year 1700, between the burgh of Dumbarton and the city of Glasgow. This exemption was dealt with in the following manner by 6th Geo. IV:—

The 44th sect. was in these terms:—"And whereas certain "claims of exemption from the foresaid rates and duties have "been brought forward by the royal burgh of Dumbarton, on "the ground of a contract entered into, in the year 1700, "between the said burgh and the Corporation of the city of "Glasgow; and whereas the said harbour or quays at the "Broomielaw were, in terms of the said recited Act of the 49th "year of the reign of his late Majesty, made over and conveyed "to the trustees under the said recited Act, as also the whole "duties authorized to be levied at the said harbour or quays by "the said Act of the 10th year of the reign of his late Majesty, "from which duties the said exemption is claimed by the said "burgh of Dumbarton; be it therefore enacted, That, from and "after the passing of this Act, the trustees hereby appointed "shall be, and they are hereby empowered and required to "relieve and indemnify the said Corporation of the said city of "Glasgow from and against the whole claims of exemption, or "otherwise, which may be founded on the contract." The 45th section was as follows:—"And whereas doubts have "arisen as to the real import and effect of the said contract, "and it is expedient provision should be made relative thereto, "be it therefore enacted, That, from and after the passing of this "Act, all ships, vessels, barges, lighters, and boats whatsoever, "*bona fide* belonging in property to the burgesses resident "inhabitants of Dumbarton, shall, with the exception and "limitation after mentioned, be exempted from payment of any "part of the foresaid harbour duties leviable at the harbour of "the Broomielaw, or at any of the ports, whether above or "below the said harbour, at which the said trustees are entitled "to levy any of the harbour or quay duties granted by the said "recited Acts or this Act; saving and excepting always vessels

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"vessels moved by the power of steam, which shall be ex-
"empted only in the event of their making a direct voyage
"from Dumbarton to Glasgow, or from Glasgow to Dumbar-
"ton; declaring that the voyage shall be considered to be a
"direct one, even although the said steam-vessel should, in the
"course of the voyage, touch at Greenock or Helensburg, or at
"any place between these places and Glasgow; and saving and
"excepting also vessels which may load coals at Glasgow, not
"*bona fide* for the use and consumption of the inhabitants of
"Dumbarton within the said burgh."

And the 46th section was in these terms:—"And be it
"further enacted, That all cargoes and goods *bona fide* the pro-
"perty of burgesses resident inhabitants of Dumbarton, shall
"be exempted from all river or tonnage duties leviable below
"or to the westward of the new bridge of Glasgow, under the
"present or the said recited Acts, save and except coals not
"*bona fide* for the use and consumption of the said burgesses
"within the said burgh of Dumbarton: provided always that
"the burgesses, inhabitants of the said burgh of Dumbarton,
"under a penalty of 20*l.* for each offence, shall at no time, and
"in no manner, and by no means whatever, cover the vessels
"and goods belonging to unfreemen or others, under the colour
"or pretence of being their own, in any time coming; and
"shall, if required, be obliged to prove their property in the
"said goods and vessels as accords with law; and to make
"affidavit before any of his Majesty's Justices of the Peace to
"the truth of their statement, if required, on behalf of the said
"trustees."

And the 3d and 4th Vict. cap. 118, contained the following proviso in its 62d sect.:—"Provided farther, and be it enacted,
"That nothing in this Act contained shall take away, prejudice,
"limit, abridge, or impair, any of the privileges or exemptions
"secured by the said recited Act passed in the sixth year of the
"reign of his Majesty King George the Fourth, from payment

"of rates and duties, in respect of ships, vessels, barges, "lighters, boats, cargoes, and goods *bona fide* the property of "burgesses resident inhabitants of Dumbarton, all which are "hereby reserved under the provisions and regulations relative "thereto, contained in the said recited Act: provided always, "that the said privileges and exemptions shall not be held or "construed to extend to the use of the said wet-dock on the 'lands of Windmill Croft, or to the rates or duties hereby 'authorized to be levied for the use of the said wet-dock."

The method pursued by the trustees and their lessees of the river dues in regard to allowing the exemption to the burgesses of Dumbarton, had not been uniform; but on the whole, it rather appeared that for many years after the passing of the statutes, the goods of the burgesses of Dumbarton had been allowed to pass free of charge, the owners making affidavit afterwards as to the property. As a rule for the future, the trustees on the 24th September, 1840, addressed the following circular by their collector to the burgesses of Dumbarton:—

"Sir,—I am directed by the Clyde trustees to inform you, "that, in consequence of the great difficulty of preventing "evasion of the river and harbour duties, arising chiefly from "the present practice of levying the duties payable by bur-"gesses resident inhabitants of Dumbarton, they are com-"pelled to proceed, in future, strictly in conformity with the "provisions of the Act of Parliament 3d and 4th Vict., cap. "118, sec. 75.

"I have accordingly to acquaint you, that, from and after "the 1st of October next, goods and vessels arriving at, or "departing from, the harbour, must pay *immediately upon their* "*arrival or departure*, and that if any exemption is claimed by "persons representing themselves burgesses resident inhabit-"ants of Dumbarton, they must *first* '*prove* their property in "'the said goods and vessels as accords with law, *and*, in each "'case, *make affidavit* before any of Her Majesty's Justices of

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the Peace to the truth of their statement.' The nature of the proof will, of course, depend a good deal on the circumstances of each case; but the trustees think they are giving a very modified interpretation to the provision in the Act, by "insisting that at least one witness, or some equivalent document or evidence shall be adduced, as proof of ownership, in "each case, besides the oath or affidavit of the person claiming "the exemption *before any such exemption is conceded*. Of "course, unless this is done, full payment of the rates and "duties will be exacted in each case, but so as to occasion as "little inconvenience as possible. The trustees instruct me, in "the case *of the vessel* and of the duties being exacted before "the statutory proof and affidavit are furnished, to return the "amount to such parties as may, within ten days of the date of "the exaction, produce to me the prescribed proof and affidavit. "In regard to goods, it is plain that this indulgence cannot be "granted; and the trustees have no alternative, in relation to "them, but to exact the full rates and duties on each occasion "of their arrival at, or departure from, the harbour, unless the "proof and affidavit required by the Act of Parliament, *be previously, or at the time, furnished*."

In the month of March, 1841, the respondents as authorized by the statutes to sue on behalf of the trustees, presented a petition to the Sheriff of Glasgow, setting forth that "William "Risk, grocer, at or near Dumbarton, had by himself, or others "acting for him," shipped on board a steam-boat two puncheons of whisky, the tonnage duties on which, in terms of the statute amounted to one shilling and sixpence. That Risk, or th persons in charge of the goods, delayed, neglected, or refused pay these dues. That the respondent Muir had seized one the puncheons of whisky, in payment of the dues, which R still persisted in delaying or refusing to pay, and theref praying a warrant for sale of the whisky.

In the course of a proof which was allowed by the Sh

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the respondents proved by one of their servants, that when the whisky was unloaded from a cart, for the purpose of being shipped, it was without any address upon it; that he asked who it was for, and was answered that it was for the appellant; that the captain at this time came up, when he inquired of him "if he "had an affidavit for the whisky, or was going to pay the ton- "nage dues, being 1*s.* 6*d.*; when the captain said he had no "affidavit, and that his instructions were not to pay the dues; "that he thereupon told the captain that he doubted he would "require to seize one of the puncheons; that the carter did not "exhibit to him a permit or any document showing to whom "the whisky was to be conveyed; that the captain did not "exhibit a permit to him, but he thinks he said he had one and "he was told he had one before the vessel sailed; that he did "not make any enquiry for the defender, before seizing the "whisky, nor did he know whether he was present."

Another servant of the respondents confirmed this evidence, and swore that "both the affidavit and payment of the dues "were demanded and refused before the seizure was made, and "that one of the puncheons was thereupon seized."

The Sheriff found that the seizure was lawfully made, and that no proof or affidavit having been produced, the presumption was raised and remained, that the whisky was not the *bona fide* property of the appellant; he therefore repelled the defences and granted warrant for sale of the whisky, in terms of the statute.

The appellant advocated the cause and pleaded,—

"1. The rates and duties which the pursuers are, by the "statutes libelled on, entitled to levy from goods shipped at the "Broomielaw of Glasgow, do not apply to goods *bona fide* the "property of burgesses resident inhabitants of Dumbarton. "All such goods, as well as the vessels belonging to the bur- "gesses of Dumbarton, are, by the statutes in question, ex- "pressly exempted from all river or tonnage dues leviable below

" or to the westward of the new bridge of Glasgow, under any " of the statutes libelled on.

" 2. The defender being a burgess and resident inhabitant of " Dumbarton, and the puncheon of whisky now in question, " which was shipped for his behoof at Broomielaw, being *bona* " *fide* his property, no rate or duty, such as that now demanded " by the pursuers, could lawfully be claimed or levied, in res- " pect of the said puncheon of whisky, (which was illegally " seized by the pursuers, and is still retained by them,) or of " the other puncheon of whisky which accompanied the same, " and which was delivered to the defender.

" 3. The defender having been always willing, whenever he " should be required to do so, to prove his property in the " said two puncheons of whisky, as accords with law, and " to make affidavit before any of Her Majesty's Justices of " the Peace, in terms of the statute, and of the practice which " has uniformly taken place under the statutes, till September, " 1840, when a new and illegal rule, not authorized by the " statutes, was introduced by the trustees, the seizure of the " puncheon of whisky in question was utterly illegal, and the " warrant now demanded for its sale is wholly unauthorized by " the statutes libelled on.

" 4. While the defender is willing to give any such proof as " accords with law, and to make the affidavit required by the " statute, that the goods in question are *bona fide* his property, " and so are not liable to the rates or duties claimed, the pur- " suers have not made a relevant statement to entitle them to " claim the said rates or duties upon the said goods, or to " demand the warrant of sale for which they have applied, in so " far as they have not alleged that the said goods. though " shipped for the behoof of the defender, and bearing to be his " property, are not *bona fide* the property of the defender, or " that the defender is not a burgess and resident inhabitant of " Dumbarton. On the contrary, the pursuers have not denied

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"that the goods in question are *bona fide* the property of the "the defender, and that he is a burgess and resident inhabitant "of Dumbarton; and, nevertheless, though the statutes libelled "on do not apply to such goods, but on the contrary, expressly "exempt them from all the rates or duties thereby authorized "to be levied, the pursuers insist upon illegally levying the "rates or duties upon the goods in question.

"5. The trustees for improving the navigation of the river "Clyde and the harbour of Glasgow, are not entitled, under "the colour of more easily levying the rates or duties autho- "rized by the statutes under which they act, to impose them "upon goods or vessels to which the said statutes do not apply, "but which, on the contrary, are expressly excepted from the "operation thereof. Neither are they entitled to impose arbi- "trary conditions not authorized by the statutes, which would "have the effect of making goods or vessels, which are "expressly excepted from the operation of the statutes, "liable for the rates or duties thereby imposed on the other "goods or vessels to which the statutes apply.

"6. The pretended conditions lately imposed by the trus- "tees, would have the effect of repealing or rendering nugatory "those express enactments of the statutes, whereby goods and "vessels, *bona fide* the property of burgesses resident inha- "bitants of Dumbarton, are exempted from the rates or duties "thereby authorized to be levied, and the said conditions, "whereby it is intended to exclude or impair the privilege "thereby given to the burgesses resident inhabitants of Dum- "barton, being illegal in themselves, and contrary to the "express provisions of the statutes, and to the practice which "has uniformly prevailed since the statutes came into operation, "and till September, 1840, cannot receive any effect from "courts of law. It appears from the statutes, as well as from "the practice which has followed upon them, that all goods or "vessels which apparently belonged to burgesses resident inha-

" bitants of Dumbarton, were *prima facie* entitled to the exemp-
" tion in question; but that, nevertheless, it should be com-
" petent to the trustees in any case, where they might deem this
" necessary, to require such burgesses to prove their property
" in the said goods or vessels as accords with law, and to make
" affidavit if required; this, however, being the exception and
" not the rule, because it was only if required that any proof or
" affidavit was to be given. It was plainly only where there
" was reasonable ground for doubting whether the goods or
" vessels were *bona fide* the property of burgesses, that any
" such proof was to be required, and even then this was not
" made a condition precedent of the exemption, but only an
" investigation to test whether the goods or vessels were really
" entitled to the exemption which had been claimed, and
" already allowed.

" 7. The puncheon of whisky in question, as well as the
" other puncheon which accompanied it, being *bona fide* the
" property of the defender, who is a burgess resident inhabitant
" of Dumbarton, and he being willing to prove his property in
" the same, as accords with law, and to make affidavit before a
" Justice of Peace, in terms of the statute, whenever required to
" do so by the pursuers, the warrant now applied for to sell the
" said puncheon of whisky, for payment of the rates or duties
" libelled, is grossly illegal, and in seizing and detaining the
" said puncheon of whisky, the pursuers have been guilty of a
" spuilzie; and the warrant now craved by them being contrary
" to the order of law, and in violation of the statutes libelled
" on, ought to be refused with full expenses."

The respondents on the other hand pleaded,—

" 1. By the Act 3rd and 4th Vict. cap. 118, the parliamen-
" tary trustees of the river Clyde are empowered, by themselves
" or their collector, to levy and recover the river and tonnage
" duties, therein specified, upon all goods shipped at the Broo-
" mielaw; and in the event of delay or refusal in the payment

"of such duties, they are entitled to seize, take, and detain the "goods; and after the lapse of three days from such seizure, if "payment be still withheld, to apply for judicial authority to "appraise and sell the goods, for payment of the duties and "charges, reserving the owner's right to claim the surplus, if "any remain.

"2. As the parliamentary trustees, in virtue of the statutes "under which they act, have a real lien over the goods shipped "at the Broomielaw for payment of the river and tonnage "duties, and as their right is declared to be preferable to any "attachment, arrestment, or claim by any other person, they "are entitled to make this preference effectual by operating "payment of the duties before the goods leave the harbour, and "are not bound to rest satisfied with a mere personal claim "against the owners or consignees of the goods.

"Though the resident burgesses of Dumbarton have a right "to claim exemption from the river or tonnage duties on goods "belonging to them, they are bound, when required by the trus-"tees, not only to prove their property in the goods, as accords "with law, but also to make affidavit before a Justice of the Peace "to the truth of their statement, in terms of the Act 6th Geo. IV. "cap. 117, sect. 46; and according to the sound construction "of this statute, the parliamentary trustees are entitled to "require the proof and affidavit from all persons claiming this "privilege before the exemption is allowed, and before the "goods are removed from the harbour.

"4. More particularly, as the parliamentary trustees are "specially authorized and empowered by the Act 32d Geo. II. "cap. 62, sect. 22, to make such orders and rules, and give "such directions for collecting the duties 'as they shall think "'most necessary and conducive to the ends for which the "'same are granted,' and as public notice was given to the "resident burgesses of Dumbarton, that where exemption from "the payment of duties was claimed, the right to such exemp-

" tion must be established in the manner pointed out in the " statute before it could be allowed, the parliamentary trustees " and their collector were entitled to enforce that regulation in " reference to the goods in question.

" The parliamentary trustees and their collector are en- " titled to a warrant of sale, in terms of the prayer of the " original petition; because, at the time the goods were shipped, " they required an affidavit that they were the property of a " resident burgess at Dumbarton, and the person in charge of " the goods refused or failed to produce an affidavit, or to pay " the duties; and also, because the right to the exemption " claimed by the advocator has never been established in the " the manner pointed out in the statute, and the duties still " remain unpaid."

After some proceedings with a view to proof of the appellant's right of property in the whisky, and his character as a burgess of Dumbarton, both of which he established, the Lord Ordinary (*Ivory*) pronounced the following interlocutor:—

" Finds, that, by the 6th Geo. III. c. 117, sec. 46, the effect " of which is expressly saved and reserved by 3d and 4th Vict., " c. 118, sec. 56 and 62, it is enacted, 'That all cargoes and " 'goods, *bona fide* the property of burgesses resident inhabit- " 'ants of Dumbarton, shall be exempted from all river or " 'tonnage dues leviable below or to the westward of the new " 'Bridge of Glasgow, provided always that the burgesses " 'inhabitants of the said burgh of Dumbarton, under a penalty " 'of 20*l.* for each offence, shall, at no time, and in no manner, " 'and by no means whatever, cover the vessels and goods " 'belonging to unfreemen or others, under the colour or " 'pretence of being their own in any time coming, and shall, if " 'required, be obliged to prove their property in the said " 'goods, &c., as accords with law, and to make affidavit before " 'any of His Majesty's Justices of the Peace to the truth of " 'their statement, if required:' finds that the two puncheons

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" of whisky here in dispute, were, on the 26th February, 1841,
" the date of their seizure libelled, *bona fide* the property of the
" advocator, and that, at said date, the advocator was a burgess
" resident inhabitant of Dumbarton; and therefore finds that the
" said whisky was, by the express terms of the above enactment,
" exempt from all duties under the said statutes: finds, that, so
" standing the fact, even though the advocator had, on the 26th
" February, been required, in terms of the enactment above
" quoted, to prove his property in the said whisky, and to make
" affidavit before a Justice of the Peace to the truth of his state-
" ment, and had at the time failed to do so, this would not have
" been sufficient to subject the said whisky in a duty, from
" which the statute expressly declared it to be exempted; and,
" more especially, that all claim under this head must have been
" excluded from the moment it was made to appear that the
" statutory ground of exemption (viz., that the whisky was *bona*
" *fide* the property of a burgess resident inhabitant of Dum-
" barton,) did truly apply thereto: but, *separatim*, finds that no
" such requisition was in terms of the statutes, either then, or
" at any other time, before the presentment of their application
" to the Sheriff, made upon the advocator, on behalf of the
" respondents: finds, on the other hand, that the advocator did,
" from the first, and, more especially through his agents, in their
" letter of 2d March, 1841, being several days before the pre-
" sentment of the respondents' application, express his readiness
" to make the statutory affidavit, and, otherwise, to comply in
" all points with the terms of the statutes, on their behalf, when
" required by the trustees (respondents): finds that this offer
" on the advocator's part was not only, throughout the corres-
" pondence which preceded the present proceedings, evaded and
" put aside by the respondents; but farther, that the said
" respondents, in libelling their application to the Sheriff, did
" not therein allege or set forth, as the ground of said applica-
" tion that the advocator had refused or failed to comply with

" any requisition on their part, and, moreover, did not even " make any such requisition upon the advocator in their said " application itself, or in any other way call upon the advocator, " or give him an opportunity to respond to or obtemper such " requisition, until it was at last stated for them, in their minute " above referred to, 'that they are willing to hold the certified " 'copy of the permit as a sufficient adminicle of evidence that " 'the goods belonged to the advocator at the date libelled, if " 'supported by the production of an affidavit that he was then " 'a resident burgess of Dumbarton, and that the goods were " '*bona fide* his property:' finds that, in these circumstances, " and on a sound construction of the statutory requirements, " there was no sufficient legal ground laid for a sale of the said " whisky, in terms of the prayer of the respondents' application; " and, more especially, finds that the advocator having now, in " compliance with the respondents' requisition, made affidavit " to the effect demanded of him, there is not now ground either " for subjecting the said whisky in the statutory duties, or " consequently for selling the same, in order to satisfy the said " duties: therefore, upon the whole matter, sustains the reasons " of advocation, assoilzies the advocator, and decerns."

The respondents reclaimed, and on the 15th February, 1844, the Court pronounced the following interlocutor:—

" Alter the interlocutor of the Lord Ordinary; find, that the " trustees were entitled under the Act of Parliament 6th Geo. " IV. c. 117, entitled 'An Act for amending three Acts for " 'enlarging the harbour of Glasgow and improving the naviga- " 'tion of the river Clyde to the said city, and for other " 'purposes therein mentioned,' to make the requisition which " was made by their collector or officer of an affidavit as to the " two puncheons of whisky being the property of the respon- " dent, William Risk: find, that as their right to make such " requisition, and the fact that it was actually made, was denied " by the said William Risk, who contended that the goods

"ought to have passed duty free, in respect of the permit "brought with the said two puncheons, or of the address, if "any, said to be on the casks, the trustees were entitled to "present the petition to the Sheriff, with the prayer for a "warrant to sell for payment of the duties: find, that the said "petition was opposed, on the ground that the detention of the "goods was illegal, and that the trustees or their officer could "not legally demand the affidavit or other proof at the time of "the shipment, or, on the failure of such production, to detain "and seize the goods: find, that the Sheriff was entitled to "give the judgment on the pleas stated; and to the extent of "the above findings adhere to the interlocutors of the Sheriff, "so far as they repel the defences, but recal the interlocutors of "the Sheriff, in so far as they grant warrant for the appraise-"ment and sale of the puncheon of whisky actually detained; "remit to the Sheriff, with instructions to order the trustees to "deliver up the said puncheon of whisky."

The appeal was against this interlocutor.

*Mr. Turner* and *Mr. Anderson* for the Appellant.—The right of exemption in favour of the burgesses of Dumbarton, recognized by the statute, was not thereby conferred upon them for the first time. It was a right already existing under the contract between the two burghs of Glasgow and Dumbarton. The statute, therefore, should receive such construction as is most compatible with the free and ample enjoyment of this right. To hold that the statute gives the respondents a right, in the first instance, to stop the goods of burgesses of Dumbarton until the latter have proved their property in the goods, and that the giving of such proof is a condition precedent to the benefit of exemption, is, in fact, to annihilate the privilege; as the expense and inconvenience of giving such proof, either by going from Dumbarton to Glasgow, or instructing an agent in Glasgow, for the purpose, will in most cases exceed the benefit

to be derived by the exemption. In the present instance the river dues exacted did not exceed 1*s.* 6*d.*, and the expense of giving the proof required would have much exceeded that sum in the most moderate way of giving it conceivable.

The statute is precise and unqualified in the terms in which it confers the right of exemption; all that the proviso does is to give the respondents, where they have grounds for suspicion, a right to require evidence of the property, but no power is conferred upon them to stop the goods until the requisition is complied with. Their protection in that respect is in the further proviso of a penalty upon the burgesses, in case of their attempting fraudulently to give the benefit of the exemption to goods, the property of persons not burgesses. The heaviness of the penalty being no less than 20*l.* for each offence, makes it manifest that this was the intention of the legislature.

Even if the trustees had, under the statute, power to detain the goods in the first instance, it could only be in a case where they had reasonable ground for suspicion that they were not the property of the person they were represented to belong to, or that he was not a burgess. Here it was notorious to the respondents that the appellant was a burgess, and no suggestion was ever made that the whisky was not his property. On the contrary, in the very petition for a warrant of sale he is called a burgess, and is stated to have shipped the whisky by himself or others acting for him.

*Mr. Solicitor-General* and *Mr. Bethel* for the Respondents.

LORD CHANCELLOR.—My Lords, the question in this case appears to me to be circumscribed within very narrow limits. It turns entirely upon the construction of the 46th section of the Act of the 6th Geo. IV. That section of the 6th Geo. IV. remains in force, notwithstanding the Act of the 3rd & 4th Vict., and, in fact, it is adopted and may be considered as incorporated into that Act of Parliament.

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Now, it appears, that by the Acts of Parliament that are referred to in the case, the Trustees of the Clyde Navigation are entitled to raise certain tolls upon goods shipped at Glasgow, but the clause to which I have referred exempts the burgesses of Dumbarton resident in that town from the payment of these tolls. In the 46th section there is a proviso that the burgesses of Dumbarton shall not cover the goods of other persons under that grant of exemption, and that they shall, if required, prove that the goods are their own, and make an affidavit for that purpose and in confirmation of that statement. Now I consider this proviso in the nature of a condition. They are entitled to the exemption upon the conditions stated in the proviso, and one of the conditions is, that they shall prove, if required, that the goods belong to themselves, or that they shall, if required, make an affidavit to that effect. If this, then, is to be considered in point of construction, as I think it is, a condition, it follows that if that condition is not complied with, the goods, though belonging to a burgess, and a burgess resident in Dumbarton, are liable to the payment of tolls precisely in the same way as if they belonged to any other person, and the trustees of the tolls are entitled to detain the goods until the tolls are paid. That, I understand, is the construction of the Act of Parliament, and it was in pursuance of that construction that the goods in question were detained.

Now, it is said that great inconvenience would result to the inhabitants and burgesses of Dumbarton, if this were to be considered as the true construction of the Act of Parliament. It does not appear to me, when I advert to the circumstances of the case, that any considerable inconvenience would arise. If goods are shipped at Glasgow for any foreign port, or for Dumbarton, they must be shipped by the burgess of Dumbarton, or by his agent. He must know, therefore, beforehand, the act that he is about to do, and he may be prepared with the necessary affidavits. If goods are shipped from a port, consigned to

him at Glasgow, and they are to proceed from Glasgow to Dumbarton, consignments of that description do not take place without notice, and in that case he would have an opportunity of making the necessary affidavit. It is said he may be absent from home at the time. If I am correct in saying general consignments of that kind do not take place without notice, then before he leaves home, or by the post when he is absent from home, he would have an opportunity of forwarding to his agent at Glasgow, the necessary affidavit for that purpose; and even supposing him to be from home, and the goods to arrive whilst he is absent without sufficient notice, what would be the effect? The goods would not be delivered to his agent, his agent would not be entitled to take possession of them unti such an affidavit were obtained; and in any part of the Queen's dominions, a day or two's correspondence would be sufficient to obtain the affidavit. The utmost inconvenience he would sustain would be this: that the goods would not be delivered for a day or a couple of days. It appears to me, therefore, that the inconvenience on that side, if it exists at all, is very inconsiderable.

On the other side, the side of the trustees, the inconvenience is very great indeed, and may be a growing inconvenience every day as people get habituated to these transactions, for if goods are shipped at Glasgow, belonging, as they may be represented, to a burgess of Dumbarton, and to be shipped to a foreign port, and the goods may not be detained until it is ascertained whether or not they were properly represented as belonging to the burgess of Dumbarton, what remedy have the trustees for the recovery of the tolls? The goods may be shipped—they may be represented as belonging to some individual, a burgess of Dumbarton—the vessel proceeds to its destination, and in what way are the trustees afterwards to recover the tolls? They cannot recover them from the burgess, he might show that they were not his property, and then they could not be recovered from anybody, and under such circumstances, the trustees who

are public officers, appointed for public purposes, might be defrauded to an almost indefinite extent.

It appears to me, that when we take the balance of convenience on the one side and on the other, the inconvenience of the construction contended for by the appellant is so great, as much to outweigh the inconvenience of the construction contended for on the other side. When you are looking at the construction of an Act of Parliament, you must look to the reasonable construction of the terms that are found in the Act in the first place, and you may properly bring in aid the inconvenience that would arise from any particular interpretation. If you find that the inconvenience of a particular interpretation would be very great, and that the words of the Act of Parliament justify another interpretation, you are justified in putting that interpretation on the Act which avoids the inconvenience, because that is a fair medium by which to ascertain what was the intention of the legislature in passing the Act.

Another question has been made in this case by the counsel for the appellant, with respect to the affidavit.—It was supposed that the affidavit was not properly required in this case. It appears to me that all was done that was necessary—the agent of the burgess was required to produce the affidavit—he did not produce it, he gave no reason for not producing it—he did not ask for time for that purpose; if he had asked for time for that purpose, it was possible that time might have been allowed to him, and he might have obtained the affidavit in the course of a few hours. It appears to me that all was done that was necessary, in order to entitle the party to detain the goods, and that under such circumstances the interlocutor should be affirmed.

Lord Brougham.—My Lords, I am entirely of the same opinion with my noble and learned friend, and as he has gone so fully into the reasons for that opinion, in which reasons

also I entirely agree with him, it becomes unnecessary that I should trouble your Lordships with more than a single word. The question is one of the narrowest in point of extent, and lies within the most confined limits it is possible to imagine; and I own, that from the beginning, notwithstanding all the zeal and diligence which has been shown by the learned counsel arguing for the appellant, I have never been able to remove myself from the view I took in the very outset, that here is an exemption from the payment of those dues in favour of the burgesses of Dumbarton, for their own goods and for those goods alone; that this exemption is given to them upon a certain condition, not merely that the goods should be their own, and that they should not colourably cover other men's goods, so as to extend the exemption from them, to whom alone it was intended to be conveyed, to others, to whom it was not intended to be conveyed; but that over and above the penalty of 20*l.* denounced on the fraudulent act, for the sake of preventing fraud, (prevention being more convenient than penalty, and less costly,) there should be the further condition of the proof to be given, and of the affidavit of the party who was the owner, that the goods were his;—if this condition be not complied with, there is an end of the exemption;—if there is an end of the exemption, the burgess has no more right to escape the payment of the dues for those goods, than a stranger would have who is not a burgess of Dumbarton; and the want of compliance with that condition of the affidavit, is just as much a destruction of the exemption, a prevention of that exemption extending to the goods of the burgess, as if the fact, which is a different case, and entirely immaterial here, as if the fact failed, and as if the goods were not his: the test of the goods being his, is one and one only, namely, the complying with that condition; that being the case, all the consequences follow, and among others the right to stop and seize—all the consequences follow which flow from there being no exemption in favour of the party.

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Those are the words of the 46th section of the Act of the 6th of the late King George the Fourth, upon these words the whole question turns, and those words are not in the slightest degree deviated from; and that enactment is not in the least degree done away with or modified by the Act of the 3d and 4th of the Queen, in the 62d section, for that section has a proviso to retain the privileges, "That nothing in this Act "contained shall take away, prejudice, limit, abridge, or impair "any of the privileges or exemptions secured by the said recited "Act, passed in the 6th year of the reign of His Majesty King "George the Fourth, from payment of rates and duties in respect "of ships, vessels, barges, lighters, boats, cargoes, and goods, *bona* "*fide* the property of burgesses resident inhabitants of Dum-"barton, all of which are hereby reserved," but how reserved? "under the provisions and regulations relative thereto, contained "in the said recited Act," that is to say, the Act of the 6th of George the Fourth, chapter 117, section 46, bringing the question therefore back entirely to that section; and to whether that section does not apply to the argument in the way described, and enforced by the learned Judges below, and in which my noble and learned friend and I quite concur. If it does so *cadet quæstio* the whole question turns on that, and if there is a condition precedent by that section, then the more recent Act of the 3d and 4th of Victoria only lets in that Act, and does not in the least degree alter it.

With respect to the mode of requiring the affidavit, I entirely agree with the view taken by my noble and learned friend. I am not saying whether it would be sufficient to have a general requisition by their proclamation and circular, that is quite immaterial, because there is here a particular inquiry, therefore be that ever so necessary it is no fact in the case.

An attempt is made to show that this is connected with the 20*l.* penalty; be it so, I do not care whether it is or not, it may be for aught I know connected with that penalty, but it is con-

nected with it as a remedy of a larger and more convenient nature, and of a more beneficial nature to the party entitled to the dues than the mere imposition of the penalty, which can only punish the party for having offended, and, perhaps by way of example, deter others from offending in that behalf. But a better and more fruitful remedy is given by way of prevention, by this condition precedent which is annexed to the enjoyment of the exemption.

In conclusion I beg to state, that I have read with great attention, more than once, the argument, which is very elaborate, and as it always is, coming from that quarter, the very able and acute argument of my Lord Moncrieff; and it gives me little satisfaction to be compelled, as I think I am by a sense of justice, to say, that I do not go along with my Lord Moncrieff in the kind of censure which seems to run through his judgment of the conduct of those trustees. I really cannot see in the conduct of these gentlemen any ground for the suspicion which his Lordship appears to have laboured under, that they were endeavouring to get rid of the rights of the burgesses altogether and seeking to do that indirectly which they were by law incapacitated from directly and openly doing. I can see nothing in their conduct for the reasons given by my noble and learned friend, of the great inconvenience to which they would have been exposed if they had not recourse to this remedy. I can see nothing in this conduct except that they have acted prudently and rightfully with a due regard to their own interest, and to that security which the law in the enactment so often alluded to has given. I thought it fit to add that, because my noble and learned friend, although his argument went to prove the point, did not specifically advert to it. I am therefore of opinion that the interlocutor should be affirmed.

Lord Campbell.—My Lords, I need only say that after listening to the very able and zealous argument on the part of

the appellant, I likewise think that the judgment appealed from ought to be affirmed. I do not feel that there is any weight in the objection that was brought forward, that there was no jurisdiction here by reason of the admission that the goods were the goods of a burgess of Dumbarton, because if a burgess of Dumbarton is only entitled to exemption from these duties, upon performance of a condition which he has not fulfilled, then he is not entitled to the exemption, and his goods are in the same situation as the goods of the rest of mankind; and it is not disputed that there would have been jurisdiction here, if the goods had not belonged to a burgess of Dumbarton.

Then that brings us to the great question, whether at the time of the shipment of the goods this affidavit may be required. The section upon which it all turns, the 46th section of the 6th of George the Fourth, certainly admits of two interpretations: one may be that the affidavit should be made at the time of the shipment, another after the shipment if required. I must say that after attentively considering the words of this section, and the object of the Act of Parliament, I have had no hesitation in coming to the conclusion, that the affidavit may be required at the time of shipment; that seems the natural and grammatical construction to be put upon the words. This is a condition upon which the exemption is awarded to the burgesses of Dumbarton.

Well, then, the argument of convenience, as has been very powerfully stated by my noble and learned friend, certainly assists us in the doubtful construction of an Act of Parliament; and I must say that all the convenience is in favour of that interpretation, which says that the affidavit may be required at the time of shipment, for that course of dealing may clearly be put in practice. If there be an affidavit required at the time of shipment, it may be made either by the party for whose goods the exemption is claimed or on behalf of that person; and the Act of Parliament may be so put in force, but it might

be utterly nugatory if you were to say that the affidavit may not be made then, but that an obligation is laid on the owner of the goods at a remote period of time to make this affidavit, because you cannot say that he could really be compelled to swear what is false, and if he refuses to make the affidavit, what is the remedy? The thing is done—the goods have been shipped—you cannot indict him for not making an affidavit which is false; and no action could be maintained against him for refusing to do that which would amount in fact to paying. For these reasons it seems to me that the argument, on the ground of convenience, is strongly in support of the judgment which the majority of the Judges have pronounced I therefore think that the interlocutor should be affirmed.

I am sure nothing we say or adjudge can have the slightest tendency to injure the inhabitants of Dumbarton. They are clearly entitled to this exemption; and I hope they will continue to enjoy it, and that there will be no vexatious attempt made in the slightest degree to impair that to which they are entitled. I express a strong hope, and I am sure that my noble and learned friends join in that, that instead of there being vexation, every possible sort of accommodation will be afforded by the trustees to the inhabitants of Dumbarton.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor, in so far as therein complained of, be affirmed with costs.

[19*th March*, 1846.]

The FEOFFEES OF TRUST and GOVERNORS OF GEORGE HERIOT'S HOSPITAL, *Appellants.*

WILLIAM ROSS and ANDREW FERGUSON, his *Tutor ad litem*, *Respondents.*

*Trust.—Damages.*—It is not competent to award, out of a charity fund, compensation to a party entitled to the benefit of the charity, in respect of his having been deprived of that benefit by the erroneous acts of the trustees for administering the charity.

THE respondent brought an action of declarator and damages against the appellants, setting forth that George Heriot, jeweller to James VI., had by his will in 1623, bequeathed certain property to "the Provost, Bailiffs, Ministers, "and ordinary Councell," for the time being, of the town of Edinburgh, for founding an hospital for the maintenance and education of "so manie poore fatherlesse boyes freemene's "sonnes of that town of Edinburgh," as the yearly income of what he gave would amount to; the hospital to be erected and governed, and the children ordered, taught, and guided, in such manner as should be appointed by himself, or by Doctor Balcanquall, after his death; that Doctor Balcanquall, in virtue of the powers given to him by the will, enacted certain statutes for carrying the intentions of the founder of the hospital into effect, whereby it was declared, that the governors should admit into the hospital as many poor scholars as the revenue would admit, who should all be children of burgesses and freemen of the burgh, not well and sufficiently able to maintain them; the scholars not to be admitted until they were seven years of age, nor to remain after they were sixteen years of age; to receive an education in reading and writing

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Scotch distinctly, and the Latin rudiments; and to be either sent to college and maintained there for four years, or to be bound out apprentices to trades, according as they should be like to prove hopeful scholars or not; and to have while in the hospital, certain yearly allowances from its revenues; the election into the hospital to be by a plurality of suffrages; that the respondent's father was a burgess and freeman of the town of Edinburgh, and died in the full exercise of all the privileges appertaining to these characters; that in 1835, there occurred 20 vacancies in the hospital; that the respondent's mother made an application for admission of the respondent to the charity; that at a meeting of the governors in April, 1835, they filled up the whole of the vacancies by admitting 20 boys to the charity, many of whose fathers were in life at the time, and did not belong to any of the corporations, and were not freemen of the town of Edinburgh, and rejected the application of the respondent; that upon the respondent's application being refused by a majority of the governors, Dr. Lee, one of the governors, dissented, and maintained that the respondent had a right to be preferred to many others who had been elected, and protested accordingly; that in the month of October, 1836, 12 vacancies occurred, when the respondent's mother again applied on his behalf, but the governors refused to allowthe application to be included in the list of applications, against which William Dick protested; that in consequence of this refusal, another application was presented to the governors, praying them to review their decision, and elect and admit the respondent to the benefit of the charity; that at the next election in October, 1836, the respondent's application was again refused by a majority of the governors; and the whole of the vacancies were filled up by the election of boys, several of whose fathers were in life at the time, and whose circumstances and situation did not bring them within the description of persons pointed out as the objects of the charity, or at least, did not afford them so good a claim to

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be admitted as the appellant—all which the governors did, in a total disregard of the will of the founder; that the governors of the hospital had illegally and improperly, and in the face of the will and the statutes, refused to admit the respondent to the benefit of the institution, in consequence of which he had suffered great loss and damage. That the appellants had been incorporated by Act of Parliament, and could either sue or be sued. Upon this narrative the summons contained several declaratory and petitory conclusions in regard to the respondent's admission to the charity, and then continued thus:—"And farther, in respect the pursuer has, in consequence "of the repeated refusals of his said applications to be admitted "to the benefit of the said institution, as before mentioned, "suffered great hardship, loss, and damage, and his prospects "in life have been seriously injured, the feoffees of trust, and "governors foresaid, defenders, ought and should be decerned "and ordained, by decree of the said Lords, to make payment "to the pursuer of the sum of 500*l.* sterling, or such other sum, "less or more, as the said Lords shall find in the course of the "process to follow hereon to be due to him in name of damages "he has already sustained, or which he may yet sustain, by "and through the conduct of the defenders, in refusing to "admit and receive him into the said hospital, and of his having "been denied the benefits and privileges thereof, notwithstanding his repeated applications to the said governors, as before "set forth."

The respondents pleaded a variety of defences, in which they admitted that the appellant was a poor fatherless boy, the son of a burgess and freeman, but denied the jurisdiction of the Court to review their proceedings, and insisted that they were entitled to exercise and had exercised a sound discretion in rejecting the appellant in favour of more clamant cases of poverty, although the fathers of the applicants were alive; but they did not question the competency of the action in the form

in which the conclusion which has been quoted, was directed against them.

The Lord Ordinary (*Moncrieff*) pronounced the following interlocutor:—"Finds, with reference to the first or declaratory "conclusion of the summons, that, at the dates of the several "applications of the pursuer, and his mother, for his being "admitted into the benefits of the hospital, he, the said pursuer, "as being admitted, or not denied, to be a poor fatherless boy, "and the son of a burgess and freeman of the town of Edin-"burgh, above the age of seven, was possessed of all the "qualifications required, either by the will of the founder, "George Heriot, or by the statutes of Dr. Balcanquall, to "render him eligible as a scholar to be admitted into the "benefits of the said hospital: finds, that by the express terms "of the said will, the said pursuer, as being a fatherless boy, "belonged to that class of persons for whom the charity was "specially constituted, and that the statutes of Dr. Balcanquall "must be construed with reference to, and in consistency with "that, as the first and fundamental purpose of the institution: "and finds, that, by the Act of Parliament passed on the 14th "July, 1836, it is expressly provided, that a preference shall "always given in the election, first, to the kinsmen of George "Heriot, 'and *second*, to poor *fatherless* boys, sons of burgesses "'and freemen:' Finds nothing relevantly alleged in this "record, for establishing that the pursuer was not duly qualified "to be put in nomination for being elected into the benefits "of the said hospital: and finds it admitted, that on both the "occasions when he was rejected, there were numerous vacan-"cies, which were not supplied by the election of fatherless "boys, the sons of burgesses freemen: but, in respect that, by "the nature of the foundation, and the express terms of all the "statutes, the sole power of appointment, or election, is abso-"lutely vested in the governors for the time, finds, that it is "not competent for this Court to find that they were bound

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"to appoint or elect the pursuer, or any other particular "individual, or to ordain them to admit him into the benefits "of the hospital: and finds, that no *jus quæsitum* can be held "to have been vested in the pursuer, merely by his possessing "all the qualifications necessary for his being so elected and "admitted: finds, that this is not a competent process for trying "authoritatively, any question concerning supposed abuses in "the management of the hospital, or how far the governors "may have been in error in their system of management, or in "the exercise of their discretion: therefore sustains the second "defence pleaded for the defenders; assoilzies them accordingly, "and decerns."

The respondent reclaimed only against that part of this interlocutor which denied the jurisdiction of the Court, and the competency of the action, but before his reclaiming note was advised he had reached the age beyond which, upon any construction of the will of the founder and the statutes of the charity, he could not be admitted to its benefit. The Court required the opinions of all the Judges, and thereafter pronounced the following interlocutor:—

"In respect of the opinions of the majority of the whole "Judges, alter the findings of the interlocutor of the Lord "Ordinary reclaimed against by the pursuer, William Ross; "and, in respect of the other findings in the said interlocutor "now final in this cause, find that the pursuer, being a poor "fatherless boy, and son of a burgess and freeman of the town "of Edinburgh, was fully eligible to be elected a scholar and "admitted to the other benefits of the said hospital, when "he applied to the Governors thereof for that purpose, and "ought to have been preferred, elected, and admitted by them "accordingly, in terms of his applications for that effect: find "that it is competent for this Court to declare that the "governors of the hospital were bound to appoint or elect the "pursuer on the occasions libelled, in the circumstances and

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"state of the facts and of the law, as finally fixed by the "findings in the Lord Ordinary's interlocutor: find that this is "a competent process in which to try any alleged error or abuse "in the management, so far as the rights and interests of the "pursuer, as ascertained by the interlocutor of the Lord Ordi- "nary, were affected thereby; therefore repel the second defence "as now pleaded in this cause: find that, on the grounds "stated, the governors of the hospital were bound to appoint or "elect the pursuer on the occasions libelled: but, in respect "that the pursuer is now past the age at which he can be "admitted into the benefit of the said institution, according to "the laws and constitutions thereof, find that decree cannot "now be pronounced, decerning and ordaining the governors "to admit and receive the pursuer as if he were still under "age; therefore, with these findings, remit the case back to the "Lord Ordinary to hear parties on the conclusions of the "summons for reparation or damages, and to dispose thereof as "may be consistent with the above findings, reserving all "questions of expenses."

The appeal was taken against those parts of the Lord Ordinary's interlocutor which were adverse to the appellants, and also against the interlocutor of the Court. The appeal was founded and fully argued upon the different grounds of defence which had been maintained in the Court below, but at the hearing, an additional defence was, for the first time, raised and argued, which, in the view taken of the case by the House, it is alone necessary to notice. That defence was, that as the respondent could not now be admitted to the hospital, the only conclusion of the summons under which any relief could be given was that for damages; but as it was not so framed as to be personal against the appellants, but was against them in their corporate capacity only, no decree could be made upon it, seeing it was not competent to award damages which could be satisfied only out of the funds of the charity.

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*Mr. Solicitor-General* and *Mr. Anderson* for the Appellants.—It is admitted that the respondent is beyond the age at which, in any view of the will and statutes, he could be admitted to the benefit of the charity. The only relief, therefore, which he can ask under his summons, supposing the grounds he has urged in support of it to be well founded, is compensation in damages for the injury he has sustained by being deprived of the benefit of the charity. If his rejection was authorized by the will and statutes, there is plainly an end of any such claim; the act of the appellants was sanctioned by the founder, and could not be complained of. On the other hand, if the rejection was not authorized by the will and statutes, the act was one for which the appellants, having no authority for it, were personally responsible. Had they, therefore, compensated the respondent out of the funds of the charity, they would have committed a breach of trust, for there is no provision in the will or statutes permitting application of the funds to the repair of damage, which the trustees may have occasioned by acts done in an erroneous administration of the trust. If it was not competent for the appellants *ex proprio motu* to make such an application of the charity funds, it was equally incompetent for the Court to order it by their decree. The principle of the decision of this House in Duncan *v.* Findlater, *Mc L. & Rob.* 911, is directly applicable to the present case, and as the summons does not contain any *personal* conclusion for damages against the appellants, the only relief which, on the authority of that case, the respondent could have asked; there was nothing which remained to be worked out by the action, and the Court should therefore have dismissed it.

*Mr. Turner* and *Mr. Bennett* for the Respondent.—The case did not come before the Court below, and was not decided by it upon the question of damages. The Lord Ordinary had found that the action was not competently framed for trying a

question of breach of trust, and the Court differing in opinion from him as to the competency of the form of the action, remitted to him to decide the question on its merits, but that decision was never given; the question of damages, therefore, is not competently before the House. But if it were, the Lord Ordinary's findings in regard to the rights of the respondent, ascertained everything in his favour which could give him a right to damages. These findings were not reclaimed against by the appellants; they acquiesced in the interlocutor generally, and all that the respondent reclaimed against was that part of the interlocutor which denied the competency of the action, and this, therefore, is all that was before the Court. In Union Canal Company *v* Carmichael, 1 *Bell* 316, it was no doubt held that the reclaiming note brought the whole cause before the Court, but there the prayer of the note was general, here it is limited expressly to the finding as to the competency of the action. The other findings not reclaimed against are irreversible here or in the Court below; and as they establish what must necessarily result in a decree for damages, the Court would have been justified, had the proceedings been allowed to reach that stage, in giving such a decree.

With regard to the question raised at the bar, for the first time, as to the competency of awarding damages out of the trust fund, the only authority cited against it is the case of Duncan *v.* Findlater, *Mc L. & Rob.* 911, but that case was materially different in its circumstances, and cannot rule the present; there the party complaining was a stranger to the fund out of which the damages were sought to be made effectual; here, according to the final findings of the Court below, the respondent is ascertained to be a party who had an interest in the fund, who was entitled to have been preferred before others for the relief which the fund was intended to afford. It is not, therefore, a misappropriation of the trust fund to apply it for his indemnification, and this may be done by the trustees not

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lecting another boy until the indemnification is made. The ase is somewhat analogous to those which are of frequent ccurrence in Chancery, where persons are complained of as aving been erroneously admitted to the benefit of a charity. he Court, while it declares the error, does not disturb the party n the enjoyment of the benefit he has so erroneously obtained. t refrains from acting, and so sanctions the continuance of hat originated in a breach of trust, and yet it does so for the ake of a party not entitled to the benefit of the trust. Here, the respondent's indemnification is allowed out of the fund, it ill be in favour of a party who was entitled to the benefit of he charity, but has been erroneously deprived of it. The case s also somewhat analogous to those where trustees have acted rroneously in the discharge of the trust, but have done so in onformity with established acts of their predecessors. In these ases the Court, although it declares the breach of trust, allows he trustees their costs out of the fund, which is *pro tanto* a liversion of the funds from the use intended by the founder of he charity.

The counsel for the appellants were not called on to reply.

LORD COTTENHAM.—My Lords, several questions of conuiderable importance and interest have been discussed at the ar connected with this charity. But it appears to me that here is one point upon which it becomes the duty of this House o dispose of the case, without any further proceedings—not hinking it necessary to hear any observations in reply to the ase made on the part of the respondent. And it is one, ndoubtedly, of very great importance, as affecting the general ourse of proceeding in Scotland, as connected with charities or rust funds.

The pursuer here complains of having been improperly ejected, that is to say, that he, being qualified, and claiming

the right to be admitted into this charity, was improperly rejected. But it appears that if he were capable of establishing his right so to have been elected at the time, at the present moment he cannot have any remedy connected with that right of being admitted, inasmuch as he has now passed the age at which, by the rules of the charity, boys can be admitted.

He then goes on, and in his summons prays for the payment of damages as some compensation for the injury he has sustained from his having been, as he alleges, improperly rejected. He sues, not the individual trustees, not those by whose personal act the alleged injury may have been sustained, but he sues, in their corporate capacity, the trustees of the charity. He does not, as I find by the summons, pray that his damages may be paid out of the trust fund; but the summons is so constituted that he could not get any damages except out of the trust fund; and, in fact, it has been understood during the whole proceedings, that if there are to be any damages at all, they must be paid out of the trust fund.

Now, my Lords, assuming the whole of the pursuer's case as far as relates to his eligibility and to the injury that he has sustained by not having been elected at the time when he proposed himself as a candidate for the vacancy which then existed; the point that strikes me is, that according to the facts as admitted on both sides, the question resolves itself into a question of damages. He can have nothing except it be in the shape of damages, and he can have damages only out of the trust fund. The question, therefore, comes simply to this, whether by the law of Scotland a party who complains of improper conduct on the part of those who have the management or trusteeship of any charity or trust fund, can obtain compensation, for an injury which he is supposed to have sustained, out of the fund in the management of those individuals?

Now it is quite obvious that it would be a direct violation,

in all cases, of the purpose of the creator of any gift, or benefit, or charity, to provide out of the charity fund for the payment of damages from the improper acts of those who have the management of the fund. If any case exist where this would not be the effect, it is certainly not the present. The fund being devoted to the purpose of charity, trustees are interposed for the better management and appropriation of this fund. The author of the gift, the creator of the charity, intended that the officers of the charity should have the fund confided to them, and he looked only to the trustees for the proper management and performance of the purposes of the trust. Whereas, to give damages out of the fund would not be a purpose which the founder had in view, but would be a direct violation of the purpose for which the fund was intended.

My Lords, this question came incidentally, (because it was not made a prominent feature of the case,) under the consideration of this House, in the case of Duncan and Findlater; and this House was very much struck to find that such a course of proceeding as I have suggested, had been adopted in Scotland. Although there had been no decision as to the right, yet it was stated, and I have no doubt accurately, that such a practice had crept into the administration of trust funds in Scotland. And the opinion of those noble Lords who attended that discussion, was expressed in disapprobation of any such practice. And observations were made which one would have supposed would have led to a very deliberate consideration in the Court of Session, as to whether such a practice was justifiable by the law of Scotland, or I might say, by the law of any other civilized country. It is true that the date of the summons in this case, appears to be anterior to the case of Duncan and Findlater, which would account for the parties not having taken up that question, in a mode which would naturally have been expected if the proceedings had been subsequent to the decision of the House in that case. But that

does not at all explain to me how in the subsequent proceedings in this case, this point appears to have been so entirely overlooked.

I observe, however, that one, and but one, of the learned Judges seems to have had his attention very much directed to this, I mean *Lord Mackenzie*. He thus expresses himself: "I "may, however add, that in any view, I should have had "difficulty in giving an opinion that damages were due, either "by the parties who rejected the pursuer personally, or out of "the funds of the institution. The latter is not I think asked." Yes, it is beyond all question asked, because the only damages to be paid under this summons, must be out of the trust fund. Then he goes on to say this: "And I should have great "difficulty indeed to adopt it, for I do not think it is in the "power of the governors to cause such an application of the "funds by any act of theirs."

No doubt Lord Mackenzie took a very correct view of what was the duty of the trustees, and how inconsistent with that duty it would have been for the Court to direct the application of the trust fund, to pay damages occasioned by the improper act of those who had the conduct and management of this fund.

Mr. Turner has referred to a practice which certainly has in some cases existed in this country, and which he considers has tended, at least, to some justification of this mode of proceeding in Scotland. Now, my Lords, it is perfectly true that in some cases, where great hardship would be done by too rigidly enforcing the application of a trust, the Court of Chancery, where application has been made to it, has *abstained* from exercising its jurisdiction to the prejudice of particular individuals, who would otherwise have been turned out of the charity of which they supposed themselves to be proper objects, and of which they had been admitted members. But that is a very different thing, from the Court *actively* interfering and directing a breach of trust, if it be a breach of trust so to apply the trust fund. I

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think counsel will in vain search for any precedent in this country, in which the Court has said: we will direct the trustees to apply the funds to purposes for which they were not intended, and are declared not to be so intended by the author of the gift. In the cases referred to, the Court, merely out of compassion to those who would otherwise have been reduced to the greatest distress and difficulty, by the enforcing of obedience, has abstained from interfering; and so has, in some instances, undoubtedly protected those who were benefited by an application of the trust fund, which the Court did not think justified by the trust itself. I believe the learned counsel did next refer to the course of proceeding nearest approximating to the present, although it is very far indeed from sanctioning the course of proceeding which has been adopted here. There are cases in which trustees incur costs, and where it is the first object of the trust to indemnify the trustees. If the costs are properly incurred by them, to reimburse them, is not a misapplication of the trust fund. If the other party is wrong, the Court directs him to pay costs. But cases occur in which the trustees ought to have the costs out of the estate, although the litigation was improperly occasioned. Occasionally, the party who pursues the litigation, is either not competent to pay costs, or is not in law liable to pay costs. Suppose, for instance, if it be possible to suppose such a case as the Attorney-General filing informations without a relator, then, to be sure, the trustees cannot get their costs, there is no relator, and they are not in default, but are improperly brought into litigation, and costs are incurred. Beyond all doubt, the Court would then give them their costs out of the trust fund; there being no other means by which they could be reimbursed, their reimbursement being the first trust to be executed. But the question here is, are damages to be paid out of the trust fund, to the prejudice undoubtedly of others, whoever they may be, who would be entitled to the benefits of this trust fund, if it were not so diverted.

Now, my Lords, finding that there is no decided authority in the law of Scotland upon this subject, finding that it would be directly in breach of the trust under which these funds are held; it does appear to me to be the duty of this House again to discountenance any such practice, if it has existed in Scotland, and to decide this case upon a ground so very clear, and so very free from doubt, as this point appears to be.

Some difficulty was supposed to exist from the findings of the Lord Ordinary not having been the subject of a reclaiming note. I do not find it very clearly explained, nor can I, from reading the opinion of the learned Judges, at all satisfy my own mind how that created so much difficulty in their view of the case. But in the view I take of the case, it creates no difficulty at all; because it appears that these findings are very innocent findings, looking at the duty this House has to perform. They go no further than to find the eligibility of the pursuer; because no reasonable doubt can be entertained, nor has any been suggested, that he was a fatherless boy, a proper object of the charity; and the only question has been, whether in respect of these qualifications he was entitled to admission, at all events, before others who had not those qualifications. Under the circumstances that now exist upon a question of damages out of the trust fund, whether the pursuer was or was not more qualified than the Lord Ordinary found him to be, is quite immaterial; because whatever his right or title may have been, if he cannot get damages out of the trust fund, he can get no compensation at all. I do not find, therefore, any difficulty whatever as to that point, and that relieves the case from some embarrassment as to some part of the argument contended for at the bar. I leave these findings where they are. But then it is said, that not having been the subject of a reclaiming note, and yet having been brought here by appeal, a conflict between two Acts of Parliament makes it doubtful how far this is competent. It does not appear necessary for this House to interfere in that

question, for it does not at all touch the ground upon which the decision will turn. The Lord Ordinary grounds his decision upon certain points, which were in that part of the interlocutor which was the subject of the reclaiming note; and these it does not appear that this House need at all interfere with, because in the view I take of the case, whether the Lord Ordinary was right as to the ground upon which he passed his judgment in favour of the defender or not; there was another ground which appears to me unanswerable, which must have led to the same conclusion. Whether, therefore, the Lord Ordinary was right in that part of the finding which was the subject of the reclaiming note, appears to me not necessary for this House to determine. It is quite sufficient for this House in lieu of that finding, to substitute the finding, that inasmuch as this pursuer under the summons could only claim damages to be paid out of the trust fund, this House is of opinion, that the claim could not have been sustained, and therefore the defenders are entitled to be assoilzied.

LORD BROUGHAM.—My Lords, I take entirely the same view of the case as my noble and learned friend. It is quite true, as was stated by one of the learned Judges,—*Lord Mackenzie*, I think,—that it does not appear that this claim is in terms directed against the fund of Heriot's Hospital Trust. It is so. But it can mean nothing else. The summons really means nothing else. For your Lordships will observe there is a careful suppression of the names of individuals, A. B. and C. D., feoffees in trust and governors of the hospital. If they were named, it would not make any difference; but they are not even named. Search the summons from the beginning to the end, and you do not discover, except by probability, who these feoffees in trust are. And this probability arises from what appears of the history of the charity, from the 13th of July, 1627, to the time of Dr. Balcanquhal,

who had been commissioned by the founder to take certain steps for making statutes at that time. The Provost, Baillies, Ministers, and Ordinary Council at Edinburgh, were then the feoffees, and trust guardians, and governors of the hospital. Consequently, it was a body of a very odd kind, of a very various aspect; for it comprises the whole of the Magistrates of Edinburgh, and the whole of the Ministers of Edinburgh. And that I take to be the constitution of the charity now. I take it for granted, therefore, that the parties are proceeded against as the feoffees of trust and governors of the hospital, and only in their *quasi*-corporate capacity.

Then they are said to have acted by a majority of their number in this case; and the thing complained of is done, not by the whole body of a meeting, but by a majority of their number, having authority to bind the minority as in all corporations; but not having power to bind the minority to the extent of making them liable for the tortious acts done by the majority against which acts the minority are stated in the summons to have actually protested; for Dr. John Lee differed from his colleagues, and protested against their proceeding. Therefore, what we are called upon to do, most clearly is nothing else than to give a compensation in damages, if there be any due at all, not against the wrong-doers for their tortious acts, not against those who committed the injury out of which *damnum* arose to this party, William Ross, but against the whole corporate body, (against Dr. Lee among the rest,) which means against the fund, for it cannot be out of the fund of the ministers of Edinburgh, it cannot be out of the fund of the town council, "the common good" as it is called of the corporation of Edinburgh, it is against no such fund, but it is the trust fund alone that can be gone against, and which alone was in the contemplation of the summons, and of the Court, namely, the fund of Heriot's Hospital, whereof these respondents are officially the trustees.

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Now, my Lords, the charge against them, upon which this extraordinary claim for compensation out of the fund of the hospital is made, is this, that the governors of the said hospital have illegally and improperly, and in the face of the will and the statutes before referred to, done the act in question; so that the charge is neither more nor less than this modest charge: that because the trustees have illegally and improperly violated their trust, that is to say, violated the statutes under which they hold their office as trustees, therefore what? not that they themselves, the wrong-doers, should pay for having violated the trust, and in the face of the will and statutes done the portious acts, and committed the injury out of which damage arose to the party complaining: no such thing; but that the fund should be answerable, and that out of that trust fund this compensation should be given for the wrong committed upon Ross, by the misfeasance of the trustees.

My Lords, I do not think it is possible to conceive a much more absurd and untenable proposition: it is making one party, namely, those who are interested in Heriot's Hospital, either the persons now actually upon the books, or the community for whose good the fund was established, for whom the hospital was founded and endowed, it is making them suffer, and the fund suffer, because the trustees of that fund are alleged to have done an injury in breach of their trust; it is making those who might have been the plaintiffs, if any one had thought fit to charge the trustees with having done wrong in their office of trustees, it is making them pay, because another party has been injured, namely, Ross; according to that, two parties having a right to complain, namely, the community or the parties interested in the hospital, and this one individual; the object is to obtain, at the expense of one of those parties, compensation for an injury done to the other. I do not think that absurdity, (I speak it with all possible respect,) could go much further than this would go, if it were to be established.

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My Lords, the practical part of the interlocutor is this claim of damages; that is the only matter that remains in the case, because, suppose the Court to have been perfectly right in finding that the preference ought to have been given to the fatherless boy, not only that he was eligible, for I do not deny that he was, I agree entirely with the Judges that he was, but supposing them also to be right in finding, (which I do not think they were,) that he ought to have been elected without more, and therefore negativing the positive discretion given the trustees within certain limits as to qualification; supposing the Court to have been perfectly right in finding that this boy ought to have been elected, and that if another vacancy arose, (which they clearly meant by their finding, because there was no vacancy then,) he should positively be elected, but for his age having become too great, so as to deprive him of his qualification; I say, supposing they were right in that, (which I think they were not,) still I should totally differ from them in coming to the conclusion, for the reasons assigned, that, therefore, damages ought to be paid out of the trust fund, for the wrong done to him.

I am clearly of opinion, that this finding was wrong, and that the interlocutor must, therefore, be reversed; and it is only necessary for that purpose to go to one part of it—that which respects his age being too great, which takes away all the practical application of the matter. I am clearly of opinion, that the only practical matter being erroneously found, viz., that damages are payable from the trust fund, it ought to be reversed,—that being the case we have no occasion to add much more.

My Lords, as far as regards the interlocutor which was reclaimed against to the Inner House, I really do not find occasion to quarrel with any one part of its findings, except the latter part, which is now before us in the reclaiming note; I do not quite agree with the reasons there given: I do not think it is quite correct to say, without qualification, that the trustees have an absolute right and discretion vested in them, unless it be

understood, (and I think, to avoid misconstruction, it ought to have been added by the Lord Ordinary, I can have no doubt that he meant that,) that they only have a right within certain limits, that is to say, that they have a right to exercise an absolute discretion in choosing qualified members; I think that is the real candid construction to put upon it, but it has the appearance of being a little stronger and a little more unqualified; I therefore entirely agree with the course pointed out by my noble and learned friend, which is to reverse this interlocutor, and to make such an alteration as my noble and learned friend has proposed in that part of the Lord Ordinary's decision.

My Lords, I cannot help concurring with my noble and learned friend; I am sorry I feel the necessity of so doing, but it is my duty to do it, in order to prevent the misapplication of doctrines, and the continuance of erroneous decisions. I cannot help joining with my noble and learned friend, who has already addressed your Lordships, in expressing my regret that, although the summons, it is true, was issued before the decision in the case of Duncan and Findlater, in 1839, yet that decision having authoritatively laid down the law upon the matter, which I cannot well distinguish from the present, the Court did not pay some attention to that decision, and that, in fact, it seems to have been much left out of sight by the learned Judges in their opinions. In all the arguments to-day, and in all these proceedings, I can see no reference to the important authority of this House setting right the law, or rather setting right the practice; It is said that the law then laid down for the first time, was new. There was no authority cited in that case to show that it was new; and I am quite sure, if it was for the first time laid down, it was so perfectly clear upon all principle and analogy, and upon every view of common sense that could be taken of the matter, that it was rightly so laid down for the first time; but I have no recollection of any case having been then brought before us, to show us that we were then laying

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down new law. I have reason however to believe, that opinions existed in Scotland, though without the sanction of text writers, and without the higher sanction of decided cases, that such was the liability of a trust fund, that it could be called upon. I think it would have been better if more attention had been paid to the decision in Duncan *v.* Findlater, and to the high authority of that case, than appears to me in this case, to have been paid to it.

LORD CAMPBELL.—I am of opinion that on the 14th of February, 1843, when the interlocutor appealed against was pronounced, the Court ought to have dismissed this action. It is admitted, that at that time no benefit could arise to the pursuer, unless he could be indemnified by the recovery of damages; and the Inner House remitted it to the Lord Ordinary, for the purpose, as I conceive, of assessing the amount of the damages; but they must have been of opinion when they pronounced this interlocutor in February, 1843, that damages in the manner prayed by the summons might be recovered.

Now, my Lords, I cannot help expressing my great astonishment that such a notion should prevail for one instant among the Scotch Judges; they seem to have thought that if charity trustees are guilty of a breach of trust, persons who are damnified by that breach of trust, are to be indemnified out of the trust fund: that is a doctrine which they lay down, reducing it into an abstract form, that if charity trustees are guilty of a breach of trust, persons who suffer from that breach of trust are to be indemnified out of the trust fund.

My Lords, that is certainly contrary to all reason and justice and common sense; it is a clear perversion of the intention of the donor, and it would lead to the most inconvenient consequences; the trustees in this manner would be indemnified ior their own misconduct, and the real object of the charity, the ntention of the founder, as to the objects of his favour, would

be entirely and completely frustrated. If there has been a wrong committed by the charity trustees—if there has been a junction of *damnum cum injuriâ*, an action may be maintained against the members, even of a trust. I believe it was held in the Auchterarder case, that the Ministers of the Presbytery of Auchterarder, who disobeyed the mandate of this House, were liable to an action for damages, for their disobedience. But if there had been any funds belonging to the Presbytery, those funds would not have been liable, the damages were to be paid out of the pockets of the wrong-doers.

My Lords, a doctrine so strange requires to be supported by very high authority. Now I have the greatest respect for the law of Scotland; I think that it has been framed by men of very great learning and wisdom, and it would astonish me very much if there had been any authority to support a doctrine so absurd; but not a fraction of authority has been produced—not a shred of authority has been produced to support this; there has been no institutional writer cited, no decision has been cited, but only reference made to an understanding.

My Lords, I believe that this understanding is of very recent origin in Scotland, and that it probably arose from certain cases to which reference has been made, where an accident happened from the misconduct of persons repairing a highway, and there being a general compassion felt, and the case being pitiable, the party received a sum of money out of the trust fund; there was no one to find fault with that, it met with general approbation, and so the practice became general throughout the country, and from that origin arose this supposed doctrine, that in all cases where trustees are guilty of a breach of duty, the damage is to be made good out of the trust fund.

That doctrine was fully examined in the case of Duncan and Findlater, to which reference has been made: I had the honour, at that time, to plead the case at the bar; I heard it

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decided in a manner that, I believe, gave universal satisfaction to all who heard it. The doctrine was entirely scouted, I may say, and I should have thought, that after that decision, we should have heard no more of it for all time to come. But, however, the prejudice that had been ingrafted in the minds of some learned persons, does not appear to be entirely eradicated, and a general notion among some of them still prevails, that this doctrine may be applied to all cases of charity. Now that doctrine is contrary to all reason, and sense, and justice; it is wholly unsupported by any authority; and I think we may safely say, it is entirely contrary to the law of Scotland; if that be so, then the damages which the pursuer claims out of the funds of Heriot's Hospital he cannot obtain; and if he cannot obtain damages in the manner that he has asked, then he can derive no benefit whatever from this action, and the action ought to have been dismissed. Upon this ground I think we must reverse the interlocutor and pronounce now that judgment which ought to have been pronounced in February, 1843, by the Court below.

LORD COTTENHAM.—As a means of carrying out what appears to be the opinion of the House, I would propose to reverse the interlocutor of the Court of Session, and to vary the interlocutor of the Lord Ordinary in this way; after the word "respect," to leave out the words that follow, and to introduce these in their place: "but in respect that the pursuer's case is "under the circumstances reduced to a question of damages, "and the only damages that could have been recovered by the "pursuer, if any, would have been to be paid out of the trust "fund, for which the trust fund cannot be liable."

It is ordered and adjudged, That the said interlocutors of the Lords of Session of the Second Division, of the 15th (signed 16th) of November, 1842, and of the 14th (signed 15th) of February, 1843, complained

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of in the said appeal, be and the same are hereby reversed; and that the said interlocutor of the Lord Ordinary, so far complained of, in the said appeal, be varied, by leaving out the following words, viz.: "by "the nature of the foundation, and the express terms of all the "statutes, the sole power of appointment or election, is absolutely "vested in the governors for the time; finds that it is not competent "for this Court to find that they were bound to appoint or elect the "pursuer, or any other particular individual, or to ordain them to "admit him into the benefits of the hospital; and finds, that no "*jus quæsitum* can be held to have been vested in the pursuer, merely "by his possessing all the qualifications necessary for his being so "elected and admitted; finds that this is not a competent process for "trying authoritatively any question concerning supposed abuses in "the management of the hospital, or how far the governors may have "been in error in their system of management, or in the exercise of "their discretion. Therefore, sustains the second defence pleaded for "the defenders," and substituting the following words: "But in "respect, that the pursuer's case was under the circumstances reduced "to a question of damages, and that the only damages, if any, which "could be recovered by the pursuer, would be to be paid out of the "trust funds, to which such funds were not in any respect liable: "Therefore assoilzies the defenders accordingly."

SPOTTISWOODE and ROBERTSON—DUNN and DOBIE, Agents.

[*20th March*, 1846.]

ALEXANDER Mc LEAN, residing at Gilmerton, near Crieff, *Appellant.*

The RIGHT HONOURABLE HER MAJESTY'S OFFICERS OF STATE FOR SCOTLAND FOR HER MAJESTY'S INTEREST, *Respondents.*

*Jurisdiction.—Service of Heirs.*—The Court of Session, in a reduction of a service as heir, has jurisdiction to reduce or sustain the verdict of the jury in the service upon the evidence which was before the jury, or to call for additional evidence if it think fit.

*Service of Heirs.—Verdict.*—Where the Court is divided in opinion as to the value of the evidence upon which a jury have given their verdict, serving a party heir, it should rather submit the matter to another jury, than give its own judgment upon the evidence setting aside the verdict and reducing the service.

THE appellant sued out a brieve for serving him nearest and lawful heir in general to the deceased Alexander Mc Lean, road contractor in Aberdeen, which was directed to the magistrates of Aberdeen. The respondents advocated the brieve to the Court of Session, and raised a process of declarator of *ultimus hæres* for having it found, that the deceased had died without heirs, and that his property had consequently devolved to the Crown. These two proceedings were conjoined, and after records had been made up and closed, a remit was made to the Lord Ordinary to take trial of the brieve. The Lord Ordinary, (*Cunninghame*,) declined to name the jury as in the ordinary case of brieves, and directed them to be summoned by the Sheriff, as provided by the statute for trials by jury. The jury were so summoned and chosen by ballot, and the service proceeded. After the evidence had been concluded the Court was adjourned for a few days, and in the interim a

printed copy of the evidence was furnished to each of the jurymen. On the re-assembling of the Court, the evidence was summed up by the Judge, and the jury thereupon returned their verdict by a majority in favour of the appellant, and served him heir accordingly. This service was duly retoured.

After two actions of reduction of the retour at the instance of the respondents, one of which dropped by protestation, and the other was dismissed upon preliminary defences, the respondents brought a third action concluding for reduction of the service and retour as erroneous, and not supported by, but contrary to, the evidence on which it proceeded, and because the evidence was incompetent, inadmissible, and insufficient, to instruct the defender's claim, and that the claim was disproved by evidence on the part of the respondents; and to have it declared that the deceased had died without leaving any relations by the father's side, and that his whole property had fallen to the Crown as *ultimus hæres*.

After a record had been made up upon the import of the evidence, the Lord Ordinary pronounced an interlocutor repelling the defences and decerning in terms of the conclusions of the libel reductive and declaratory, to which he subjoined the following note:—

"The Lord Ordinary agrees with the defender in the respect "that is due to a verdict pronounced, as this was, by a fairly "chosen jury in a fairly tried cause. But, in reviewing verdicts "in services the rule is, that it is *the Court* that is to be "satisfied, and not satisfied from deference to the jury, but by "the evidence. It is needless, therefore, for the one party to "praise the intelligence of this inquest, or for the other to say "that the verdict was only pronounced by a majority of one. "The question now is, what, in the opinion of the Court, is the "verdict that *ought* to have been delivered?

"The Lord Ordinary is quite clear that it ought to have "been the reverse of what it was.

Mc Lean v. Officers of State, Scotland.—20th March, 1846.

"He formerly (10th July, 1835) decided what was nearly "this identical case, by an interlocutor which held that the "defender's *father* had no right. On that occasion he explained "the grounds of his judgment in a full note, to which he refers. "Upon the 12th of June, 1836, this interlocutor was adhered to "by the Court. But the matter is again called in question by "that defender's son.

"The evidence in both cases is certainly not *absolutely* "identical. But in substance it is so. The Lord Ordinary "does not think it at all strengthened on the defender's side, "nor weakened on the side of the pursuers; and, independently "of all bias from the result of the former cause, and considering "the proof as now adduced for the first time, he is of opinion "that the defender has totally failed. Something was said at "the debate about the inclination which one has rather to take "part with a poor man struggling against the Crown. The "inclination is extremely natural. But, however it may influ- "ence, (or may have influenced,) the jury, it must be utterly "repressed by a Court, which, even in such a case, is bound to "hold the scales perfectly even. The Lord Ordinary hopes he "may be excused for expressing his opinion that, letting jury- "men take copies of the evidence home with them before "disposing of it, can never increase the chances of a sound "verdict, especially if they get that opportunity of influencing "their minds before even hearing the parties. Its worst "tendency is to diminish the weight of the Court. Whether "the Court differ from the jury on this occasion or agree with "them, the pursuer has a greater interest to ascertain than the "defender."

The appellant reclaimed to the Inner House. Two out of three of the Judges, Lords Medwyn and Moncrieff, were for adhering to the Lord Ordinary's interlocutor. The third, the Lord Justice Clerk, thought it impossible, on the evidence, to set aside the service and disregard the verdict of the jury; and

that, if the majority were not satisfied that the verdict was supported by the evidence, it should be submitted to another jury, upon the respondents paying the expenses of the first trial. The majority, however, pronounced an interlocutor adhering to that of the Lord Ordinary.

The appeal was against both interlocutors.

*Mr. Anderson*, for the Appellant, besides commenting on the evidence as in truth supporting the verdict, argued on the authority of Galbraith *v.* Galbraith, 5 *Wil. & Sh.*, that the Court had no jurisdiction to review the verdict in an action, upon the evidence which was before the inquest; that it was incumbent on a party seeking to reduce a service, to disprove it upon fresh evidence; and that, until he did so, the Court was bound to hold the verdict as conclusive; that, however doubtful this might have been in earlier times, it could no longer be so, since jury trial had been established in Scotland as an ordinary part of the administration of justice; and more particularly was this applicable to the present case, inasmuch as the jury had been summoned and chosen in the manner pointed out for the trial of civil causes.

*The Lord Advocate* and *Mr. Mure* appeared for the Respondents, but at an early period of the Lord Advocate's address he received such a strong intimation of the sense of the House, that the case could not be disposed of without being submitted to another jury, that he sat down, and Mr. Mure did not address the House at all.

Lord Campbell.—My Lords, in this case I cautiously abstain from giving any opinion either way, on the merits, either for the Crown, or for the claimant; but I am clearly of opinion that your Lordships ought to direct an issue to try the question, whether the appellant be heir at law of Archibald Mc Lean, the deceased, or not.

Mc Lean *v.* Officers of State, Scotland.—20th March, 1846.

My Lords, I think it right to say, that I entertain no doubt at all with respect to the first point that has been made by Mr. Anderson at the bar. There seems to be no ground, either upon principle or authority, to say that a retour of this sort, though it be in *foro contentioso*, may not be reviewed and set aside by the Court of Session, although there be no fresh evidence given. Indeed, it would be strange if it were so, as it is allowed that the Court of Session is a court of appeal and has jurisdiction over such retours, where fresh evidence may be given. How absurd it would be to say that they can have no jurisdiction without fresh evidence; and that if the verdict is manifestly wrong on the evidence which has been given before the jury, it may not be set aside. Suppose all the evidence is documentary, and no fresh evidence can be given, but the jury either corruptly or ignorantly have come to a wrong conclusion; in that case it would be most monstrous to say that the law affords no remedy for the injured party. It seems to me that there is no authority for such a proposition.

In the case of Galbraith and Galbraith, the only case relied on, when it comes to be examined, it will be found that they did examine the evidence in the Court of Session, and this House would have been prepared, if the evidence had not satisfied them, to set aside the decision; for they thought they had complete jurisdiction to do so. I would not say, that whenever the Court examine the verdict on an inquest, they ought in every case to grant an issue. If they manifestly see either that the verdict was right, or if they see that the evidence is all on one side, and that the verdict ought to have been the other way, they may then exercise a power belonging to them, *proprio vigore*, without an issue; and they may give final judgment and set aside the retour. But where the case is clear, where a claimant has made out his case to the satisfaction of a jury; and where the evidence, if believed, shows that he has a clear title to the verdict that has been obtained, I think in the exercise

of a sound discretion, the Court ought not to set aside the verdict and finally decide against him; but under such circumstances, the proper course is to direct an issue as to whether the claimant be heir at law of the person he represents; and on the verdict the Court will afterwards proceed to give their decision on the question of reduction.

In this case, a number of witnesses have been called, who may have been guilty of perjury, and who may on a fresh investigation, be considered as guilty of perjury; but who, if they are to be believed, make out the case. I cannot take on myself to say that that evidence is false. It would be infinitely more satisfactory to me that there should be an issue directed, in order that a jury, seeing the witnesses examined, and observing their demeanour, may know what credit is to be given to the testimony they adduce. Therefore I have no hesitation in saying, that in my opinion, the Lord Justice Clerk took a just view of this case, and that it ought to follow the course he suggested, namely: that the evidence not being satisfactory to the Court, so that they could not establish the retour, it ought to be returned for further investigation. I therefore advise your Lordships to reverse the interlocutor whereby this matter was finally determined, and to direct an issue to try the question, whether the claimant, Alexander Mc Lean, be the heir at law of Archibald Mc Lean, or not.

Lord Brougham.—My Lords, I entirely agree with my noble and learned friend, in the view he takes of these two interlocutors; that in March, of the Lord Ordinary; and that in December, 1843, of the Inner House, affirming the Lord Ordinary's interlocutor; that they should be reversed, and an issue directed to say whether the claimant be heir at law, or not.

My Lords, if I wanted any proof that the Lord Justice Clerk took a right view, or that my noble and learned friend

has taken a right view of the case, that proof would be supplied by looking at the judgment of the Lord Ordinary, and seeing how far that goes to show that an issue is the proper mode. He says, "There are some subordinate points as to which the "evidence for the defenders is preferable to that of the pur-"suers. But on the decisive facts, it is not only inconclusive, "but in its general character it is liable to very obvious "exception." He goes on to say: "Again, statements truly "made by Archibald are important, but they require to be well "proved." Then he says: "The rest of their proof may possibly "establish that the father of the defenders was Peter, that Peter "was the son of Nicol, and that Nicol had a brother, and called "John; but on the radical point of this John being the blind man, "it not only fails, but his propinquity is disclaimed." And then he concludes: "On the whole, the Lord Ordinary thinks that "the pursuers have established their case, and his impression is, "that the evidence in many respects is not quite honest." Very possibly. I do not take on me to decide that point here, when a jury who heard the evidence, and who saw the witnesses examined, have decided the other way.

I therefore entirely agree with the Lord Justice Clerk, except upon the point of paying the expenses of the former trial. That is quite out of the question. That cannot be done. There is nothing to pay them. With that exception I entirely agree with the view he takes, and I entirely differ from the view that was taken on affirming the Lord Ordinary's interlocutor. It is possible that the Lord Ordinary may be right; it is possible that the Lord Justice Clerk may be right; it is possible that the verdict may be wrong. But of course I abstain from giving the least opinion, either for the Crown or for the appellant, upon that. It is entirely a question which must be decided after we have the result of the trial before us. All I say is, that it is very possible that the defendants' witnesses, may not be quite honest, that they may have been guilty of perjury, and

that the jury may have done wrong in believing them. I think as it stands at present, the evidence is not sufficiently satisfactory to make it a perfectly clear case. Then I agree with my noble and learned friend in what he has thrown out in the course of Mr. Anderson's argument, that the Court had jurisdiction at one time, but that that jurisdiction was taken away by the Jury Act. But this is not a case calling for decision of that at present.

Lord Cottenham.—My Lords, this is peculiarly a case in which the Court of Session ought to have the assistance of a jury in ascertaining the rights of these parties. The interlocutor, as it stands, disposes of the title of the defendant, as to which title on the pedigree conflicting evidence upon the trial took place; and the result is that the Court before which this matter was discussed were divided, not as to the course they ought to pursue on the evidence, but as to the result of the evidence before it. Lord Justice Clerk says he considers it impossible, on the evidence before the Court, to affirm that judgment, that is the judgment of the Lord Ordinary, to set aside the appellant's service, and reduce the verdict which the jury has found in the appellant's favour. Here, then, we have a verdict on conflicting evidence, and the balance of evidence considered so uncertain, that the judges before whom the matter is discussed cannot decide upon it. And what my noble and learned friend has just read of the Lord Ordinary's judgment, who originally pronounced the decision, shows that it was a matter of doubt and difficulty to come to a right conclusion on an examination of the evidence. The Court of Session has decided on the title, and it has decided on the evidence brought before it without putting the matter into a train of inquiry by which the rights of the parties might be ascertained. Considering that the Court of Session had jurisdiction in this matter, and that they ought to have pursued the inquiry to satisfy themselves of the

rights of the parties, I think that an issue should be directed to ascertain, as the Lord Justice Clerk proposed,—to ascertain whether the appellant be the heir of the party he alleges himself to be heir to. Therefore I entirely concur in what has been proposed, that the interlocutor be varied by directing an issue.

It is ordered and adjudged, That the said interlocutor of the Lord Ordinary of the 18th of March, 1843, and the said interlocutor of the Lords of Session of the Second Division, of the 1st of December, 1843, respectively, complained of in the said appeal, be, and the same are hereby reversed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with instructions to direct the following issue to be tried before a jury, in terms of the Acts of Parliament, and Act of Sederunt, establishing trial by jury in Scotland, viz.: whether the appellant, Alexander Mc Lean, is nearest and lawful heir in general to Archibald Mc Lean, road contractor in Aberdeen, deceased: and after such trial had to proceed further in the said cause as shall be just and consistent with this judgment and these instructions.

[*27th March*, 1846.]

The RIGHT HONOURABLE JOHN ALEXANDER EARL OF HOPETOUN, and others, heritors of the Parish of Kirkliston, *Appellants*.

WILLIAM RAMSAY RAMSAY, Esq., of Barnton, and SIR JAMES GIBSON CRAIG, of Riccarton, Bart., *Respondents*.

*Res Judicata.—Locality.—Common Agent.*—A decree, in a process of augmentation and locality of stipend, whereby the lands of individual heritors were declared not to be liable, in payment of stipend, as being held *cum decimis inclusis*, which had been consented to by the common agent, was *found* to be binding upon the general body of heritors, though the consent was not given with their express authority.

IN a process of augmentation, modification, and locality of the teinds of the parish of Kirkliston, to which both appellants and respondents had been co-defenders, the respondents gave in minutes claiming exemption from payment of stipend in respect of certain lands, on the authority of a report of sub-commissioners in 1629, exempting the lands from valuation, because of the titles, (which, however, were not produced with the report,) and surrendering the teinds of other lands. These minutes were, on the 4th of February, 1831, allowed to be seen by the common agent, who thereafter circulated an interim scheme of the proven rental among the heritors, wherein he did not comprehend the lands of the respondents, but stated that he was satisfied the claim of exemption was well founded, and that he was ready to consent to its being sustained. The Lord Ordinary found that the teinds of the parish amounted to the sum in the scheme of the proven rental, and on the 2nd of July, 1831, pronounced an interlocutor, which as to each of

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the respondents was *mutatis mutandis* in these terms:—"Of "consent sustains the claim of *decimæ inclusæ* in regard to the "lands of Hallyards, and ordains the common agent to answer "this minute *quoad ultra*, betwixt and next calling."

Five years afterwards, while as yet no final decree of locality had been pronounced, the common agent insisted upon the respondents producing their rights to their teinds, in consequence of his having accidentally seen titles upon the Record, which gave him reason to think that the respondents were not entitled to the exemption which had been allowed. And upon their refusing to produce their titles, an action was brought by the common agent, in the name of the appellants, for reducing the interlocutors which have been mentioned. The first ground of reduction, which was followed by others on the merits of the claim to exemption from payment of stipend, but which, in the view taken of the case by the House, it will not be necessary to notice, was in these terms:—"*Primo*. The said interlocutors "bear to have been pronounced of consent, but no consent "on the part of the pursuers was given to either of these "interlocutors."

The respondents answered this ground of reduction by a plea of *res judicata*.

The Lord Ordinary (*Murray*) repelled this plea and decerned in the reduction, and subjoined to his interlocutor a note which, in regard to this plea, was in these terms:—"It would "be going further than the Court has done in any former case, to "exclude an action for reducing an interlocutor pronounced of "consent of a common agent in a locality, where no extract "has been made."

The respondents reclaimed to the Court, which, on the 2nd March, 1841, recalled the interlocutor of the Lord Ordinary, "sustained the plea of *res judicata*, and repelled the reasons of "reduction."

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The appeal was against this interlocutor.

*Mr. Turner*, *Mr. H. J. Robertson*, and *Mr. Anderson*, for the Appellants.—A judicial consent in order to be binding must be given by a party having authority to that extent, but a common agent has no such authority. The very history and nature of his office exclude the idea. Formerly the titular prepared the locality, and each heritor had to attend to his own interest in regard to the proportions, according to which an augmentation of stipend was to be allocated. The conflicting views entertained by the different heritors necessarily occasioned great delay, and expense, and much hardship to individual heritors, as each was liable for the whole augmentation, so long as a scheme of locality was not prepared. To remedy this the office of common agent was created; the duty of this officer being to collect together the titles of the different heritors, and after seeing them, to prepare a state of the order and proportions in which the augmentation should be allocated, according to the information which the titles afforded. In all this his office is simply official, more resembling that of an officer of Court than of an agent strictly so called. His duty is to assist the Court in a matter where there must necessarily be a number of conflicting liabilities, by preparing a view of those liabilities, and, at the same time, protecting the parties *inter se*, from any excess of liability being imposed upon them; but it was never intended that he should have power, nor was it ever supposed that he had power, to bind each heritor as his agent, strictly so called. It could hardly be so, for he is not appointed even by the body of heritors, and still less by the individual heritor whose interests may be the peculiar subject of inquiry. All the power the heritors have in the matter is to meet for the purpose of suggesting a person to be appointed by the Lord Ordinary. In this the voice of the majority prevails, and it may so happen, as to the individual heritor, that the person appointed, was not only

not suggested or appointed by him, but was appointed against his vote and wishes. No practical inconvenience can arise to him from this, so long as the common agent is looked upon as an officer bound to protect the heritor's interest, but not empowered to sacrifice or give them away gratuitously or otherwise. Because each heritor, notwithstanding the appointment of the common agent, protects his individual interests by his own individual private agent, who watches the proceedings of the common agent, and by the forms of the Court has an opportunity afforded him of objecting to them, where he sees cause, which of itself refutes the notion of the common agent being the agent of each heritor, entitled to bind him by his acts.

[*Lord Cottenham.*—Who is it that conducts the cause—that represents the heritors in the conduct of the augmentation and locality to its conclusion?]

The common agent. In the present instance, if the common agent had insisted upon production of the respondents' titles, and, after seeing them, had, in the scheme of the proven rental, intimated his opinion of the respondents' liability, or freedom from liability, he would have acted within the scope of his duty; but in dispensing with that production he was wanting in the performance of his duty, and in consenting to the interlocutors in question he altogether exceeded its bounds. Instead of protecting the interests of the general body of heritors, he, by consenting to the exemption from liability claimed by the respondents, made a sacrifice of their interests; for, in proportion to the exemption given by the respondents, he necessarily imposed a corresponding liability upon the other heritors.

If the common agent had confined himself to his duty it would have been open to the appellants, either to have assented or to have dissented, by objecting either to the scheme of the proven rental or to the scheme of locality; but by consenting to the interlocutor of exemption, he put it beyond their power to help themselves. It is not pretended that he gave the consent by

any authority from the general body of heritors; the consent was his own original act, the first intimation of which to the heritors, was in the perusal of the interlocutors themselves, and, therefore, the heritors had, at no time, that opportunity of protecting themselves against an excess of liability being thrown upon them, which the whole frame of the process of locality is intended to afford them.

The doctrine of *res judicata* is rested upon this, either that the judge has actually decided the matter in dispute, or that the parties have agreed to take from him a decree, as if he had done so. Both these elements are awanting here. The judge never had the matter even presented to him for his opinion, and the parties did not agree to accept the decision which was given; the common agent had power to present the matter in a shape proper for adjudication, and to take the opinion of the judge upon it, but he had no power to compound or compromise, and still less gratuitously to abandon, the rights of the heritors. Having no power to consent to the interlocutors, no consent was, in fact, given, and they are, in every view, open to reduction.

*Mr. Solicitor-General* and *Mr. Mure* were heard for the Respondents.

LORD BROUGHAM.—My Lords, in this case we have the unanimous judgment of the learned Judges in the Court below, who appear to have paid very great attention to the case, and to have had no doubt whatever upon it, the only appearance of doubt being in the early part of the Lord Justice Clerk's judgment, as reported in 3rd *Bell and Murray*, where he says that he had the gravest doubts from the beginning. But it turns out that what he means and expresses in courteous language towards the learned Lord Ordinary, whose judgment he is about to reverse, is that he had from the beginning, the gravest doubts of the

soundness of the Lord Ordinary's interlocutor; and he afterwards goes on to show that he has no doubt whatever, (however courtesy towards the Lord Ordinary might have induced him to express a doubt,) that the Lord Ordinary had miscarried in the decision at which he had arrived. The Lord Ordinary does not appear to have given the usual attention which that learned and excellent Judge gives to cases which come before him; it is a very perfunctory judgment, in a single sentence dealing with the question; the other Judges, the Lord Justice Clerk and Lord Moncrieff, appear to have given great attention to it, and to have had no doubt; and it is very remarkable, as we are now on a point of practice, namely, as to the functions and constitution of the office of common agent, (and upon the power of the common agent to bind the party proceeds their Lordships' opinion,) it is a very remarkable circumstance in the first place, if the argument can hold good, which has been powerfully urged before us to-day and yesterday, as to the want of power in the common agent to bind the party by consent, that those learned Judges should have taken it for granted the other way; and it is equally extraordinary, that if this was the real point in the case, and in reality the only point in the case, it was never made in the Court below. The learned counsel, Mr. Mure, who was in the case in the Court below, has stated, what appears to be borne out by the tenor of the report, that it was not made there, though, I will not say it was not mentioned, it might have been parenthetically mentioned, and according to one of the reports, the Lord Justice Clerk might have alluded to that parenthetical mention of it, but beyond all doubt, it was not the point in the cause; it was not the matter relied upon by the party whom Mr. Turner and Mr. Robertson represent, whereon they were contented to rest their case below.

Under these circumstances, I feel no hesitation in expressing my concurrence in the judgment of the Court below; and

am prepared to move your Lordships to affirm that judgment, with costs.

My Lords, the summons sets forth that there was no consent given by the party in the cause. Now, in my humble judgment, it would have been very competent, certainly, in my humble judgment, it would have been almost necessary for the party dealing with a decree, which on the face of it purports to be a decree by consent, to have said that there was no consent by the party, and to traverse the authority of the common agent to adhibit that consent so as to bind the parties, considering that they were dealing with a record, and seeking upon that ground, to reduce the summons; that would have been the fit course to have taken; and why? because, my Lords, it was fit to give the other party an opportunity, by knowing what the ground of contention against him was, to be able to meet that contention. How do I know that he might not have distinctly proved that, in point of fact, there was positive and distinct authority? How do I know but that other matters might have been brought forward, which, at all events, might have cut out of the cause that contention? that was not done, however; all that has been done is to rely on the argument of the want of authority of the common agent, against which I have come to the opinion of the Court below, and consider that there is no ground whatever for the appeal.

As to the authority of *Lord Stair*, I have looked into it, but I do not think it is possible to say that it is law to the extent to which it is pushed, because, says Lord Stair himself, *reipublicæ tandem interest ut sit finis litium.* A very, very, lengthened *tandem* indeed it would be, if it were that length; it might well be said to be too long, if the *finis litium* were only to be after you have waited 150 years, and no new matter had come *ad novitiam.* I never heard, by the way of *res noviter veniens ad notitiam,* ever being pretended to be urged as an argument against a decree, even when a new point of law has been urged, or a new fact not

known nor heard of before; that is done on pleadings, but never on argument at the close of the proceedings; if it were so, as has been argued, there would be an end of all finality of decrees; and why should there not be an end at once of all prescription, even that *longissimi temporis*, because some new point of law has arisen, or some new fact not formerly known has occurred? Looking to *Lord Stair*, there are other passages which seem very much the reverse of, and inconsistent with, that doctrine; but I observe that *Lord Stair* is at this time in that state of the law and jurisprudence, when he denies the right of appeal to Parliament: he gives seven or eight different reasons why there can be no appeal to Parliament; and he instances the claim of right to an estate, and says that no man could say so absurd a thing as that there should be an appeal on account of misdirection, but only on the ground of exceeding the jurisdiction—that then only Parliament might interpose; and he gives as one reason, that the Court of Session had the power of reponing, as already stated; therefore, when there was an appeal to Parliament, perhaps decrees might have been of a less final nature, in his apprehension, than they must be held to be now; however, we are not called on to deal with that question here, and I should be sorry to hear that made a practical question; we are not called on to dispose of it now, it is not raised before us, suffice it to say, that on the ground of the consent, which has not been shown to have not been given, which, on the contrary, is admitted to have been given, by the party who at all events represents the heritors, where nothing to the contrary is done, (and nothing here was done to the contrary,) and his authority must be taken to be sufficient to that extent, I am of opinion that the Court below has come to the right decision, and humbly move your Lordships, without arguing it at greater length, that this appeal be dismissed, with costs.

LORD COTTENHAM.—My Lords, on this first point I am of

opinion that the interlocutor ought clearly to be affirmed. The first ground stated in the summons raises the question which has been argued at the bar. It seeks to reduce certain interlocutors of July 1831, and alleges this as the ground, "That the "said interlocutors bear to have been pronounced of consent, "but no consent on the part of the pursuers was given to either "of those interlocutors."

Now it is argued at the bar, and admitted on both sides, that the course of proceeding with regard to that interlocutor of 1831, was, that the common agent being appointed, and having done that which he thought right and necessary for informing himself of the rights of the several parties, consented to this interlocutor being made. "The Lord Ordi- "nary, by consent, sustains the claim of *decimæ inclusæ*," as regards certain lands; that is the nature of the interlocutor now sought to be reduced, and the question raised is on the ground that it is stated to be drawn up by consent, whereas the pursuers never did consent. The fact turns out that the common agent who acted did consent—there is no mistake of the officer —there is no false statement of a consent never given, but the case argued at the bar is, that the consent was given by the common agent, who, it is alleged, had no authority to give it.

Now, my Lords, I am of opinion that the counsel for the appellant have entirely failed in establishing that proposition. I asked the learned counsel who it was that represented the party in the conduct of the cause, not in examining the locality, not for the purpose of ascertaining in what shares the burden ought to be borne, but who represented the parties in the conduct of the cause, and the answer was, the common agent, as I knew beforehand it must be. That is, the common agent represents the parties, unless the interests are split. Here then, the body of heritors continue to be represented by the common agent; a question arises between that body and certain individuals possessing certain lands, but, as far as the heritors were concerned,

the common agent continues to represent them, and of necessity representing them, is armed with all the authority which any other agent has who represents parties in a cause in the course of litigation, and the consent is given by that individual. The appellant has entirely failed to show, by authority, that the common agent had not that power; the learned Judges below have not even suggested a doubt that he had it; and it appeared to be matter of some doubt or question at the bar, whether the question really was raised below. It would have been better for the appellant's argument, that it had not been raised there, because then the attention of the Judges would not have been called to it. But if it was raised, the learned Judges thought so little of it, that they took no notice of it in their judgments; and I think the course taken by the learned Judges upon that point is very strong proof that it is the ordinary practice of the Court of Session, the well-known and recognised practice, that the common agent, for all purposes, represents those who are litigant, and whose cause he is conducting.

On the merits, therefore, if the record is sufficient to raise that question, I have no doubt of the appellant having entirely failed in the grounds on which he sought to reduce the interlocutor. But I quite concur in what is thrown out by the noble and learned Lord who first spoke, that this record is very ill adapted to raise that question at all. I give no opinion on that, it is a question not brought regularly before us; but if it be the course of pleading in Scotland, it is, in my opinion, a very imperfect mode of pleading, if, when you seek to set aside a record on some matter *dehors* the record, not apparent on the face of it, something quite independent of the record, you are not to allege what that matter is, but simply to allege that the pursuers did not consent, and then to support that by going into the legality of the conduct, and the character of the individual, which, if the case was intended to rest on that, ought to be very clearly stated, in order that the other party might have

the opportunity of meeting it. Here there is a mere allegation against what is on the face of the record. I do not know whether that is the practice in Scotland. But certainly that mode of proceeding would not be permitted in this country. It is quite sufficient to dispose of the present case, to show that if it had been properly alleged in the summons, still there is no case made to support it.

LORD CAMPBELL.—My Lords, I am of opinion that this interlocutor ought to be affirmed, and I offer my opinion, not without some confidence, for I have now to deal with a branch of law with which my mind was earliest imbued. In my early days I heard a great deal about augmentations and localities, and interim localities, and common agents, and I was very early initiated into the functions of the common agent.

My Lords, the question you have to determine is really a very short one. This is an action to reduce, it may be considered (throwing aside the embarrassing circumstances) an action to reduce the interlocutor of 1831, upon the ground that it professed to be pronounced by consent, and that there was no consent. That raises the short issue; was there consent or was there not consent? If there was consent it is allowed that the interlocutor is binding; if it was without any consent, then it ought to be reduced. I will suppose now that the vice is sufficiently pointed out by the summons, although I feel very much the weight of what has been pointed out by my noble and learned friend who has preceded me, but I will suppose that the vice of the want of consent is sufficiently alleged. Well, then, was there consent or not? *De facto* there was the consent of the gentleman who acted as common agent, and it is not alleged that he did not act with perfect honour and integrity. That raises the question, whether his consent was a nullity. Mr. Robertson very logically and very ably argued, that if this consent was a nullity, then there was no consent, and he makes

out the allegation of the summons. But, my Lords, when I consider what the functions of the common agent are, according to my preconceived notions, and which are completely corroborated by the answer which Mr. Robertson gave very candidly, though with some little reluctance, and which is completely confirmed by the Acts of *Sederunt*, and by the practice which clearly prevails in Scotland, I have no doubt whatever, that the common agent had the power *bona fide* to give this consent. Now for the purpose of facilitating a locality which I know is a most difficult, and harassing, and thorny proceeding, instead of there being all the agents of all the heritors, great and small, wearing caps and bonnets, meeting together and preparing a scheme, there is this common agent employed. Well then, my Lords, this common agent in all matters in which the heritors have a common interest, is the agent of each heritor; they may supersede his authority, but till it is superseded, he is to do the best he can for the body of the heritors: he is to investigate the preliminary questions, which must be settled before the scheme of locality is prepared, and in these preliminary investigations, he is to do the best he can for the body of the heritors; subsequently, when a question emerges, in which a particular heritor has an interest, distinct and opposed to that of the body of heritors, he does not represent that heritor, but he represents the body of the heritors against that heritor. But then it appears quite clear now, that if any litigation arises between the body of the heritors and a particular heritor, he conducts that without any fresh retainer or mandate, because it was within the original scope of his authority, when he was appointed common agent; so, my Lords, he has clearly authority to give this consent, he acting *bona fide*. It is said he ought to have gone round and asked all the heritors on this question of *decimæ inclusæ;* very little benefit would have arisen from any such proceeding. But they employed him, and gave him his authority to act. If he had acted fraudulently, or with gross negligence,

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hough such an interlocutor as this had been pronounced by nsent, it might be reduced—but it would be reduced, not on e ground of being without consent, but on the ground that e consent had been given fraudently or with gross negligence; such case, however, is suggested. For these reasons, I think at the issue joined of consent or no consent, is clearly against e pursuer; that there was consent; that, therefore, he has failed his allegation, that the interlocutor was properly pronounced, d that it ought to be affirmed, with costs.

Ordered and adjudged, That the petition and appeal be dismissed s House, and that the interlocutors therein complained of be affirmed, th costs.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNEL, Agents.

[30*th April*, 1846.]

The Right Honble. John Hamilton Dalrymple, Earl of Stair, *Appellant*.

William Read King, Esq., of Serjeants' Inn, London, *Respondent*.

*Tailzie:—Part and Pertinent.*—In order to make an entail, duly registered so as to be binding against creditors of lands, which had originally been acquired as a separate tenement, it is necessary either that the entail embrace them by name or that they should be shown to have been actually possessed as part and pertinent of other specific lands *nominatim* embraced, by the entail, for the prescriptive period prior to the making of the entail; and for the purpose of showing such possession the mere fact of possession of other contiguous lands upon titles with part and pertinent, and a statement, in the titles made up from time to time, that the lands, alleged to have been possessed as part and pertinent, were embraced by the entail, was not held sufficient.

In the year 1677, John Lord Bargeny, who was infeft in the property and superiority of the lands and isle called Inch, and in the property only of the lands of Cults, executed a disposition of both parcels of lands, along with a variety of other lands, in favour of Sir John Dalrymple, by a conveyance to Sir John "and his "nearest and lawful heirs male," giving them the following description:—"All and Haill the lands and isle called the Inch, "with the mannor within the said isle, with the lochs and fish-"ings within the said lochs, and castle betwixt the said lochs, "with their pertinents, &c., &c. And sicklike, All and Haill the "thrie-pund land of Cults, with houses, biggings, yairds, woods, "fishings, pairts, pendicles, and pertinents therof whatsumever,

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" lyand within the said parishin of Inch, and sheriffdome of " Wigtoune forsaid, and that be way of excambione and permu- " tation of the fyve-merk land of Meikle Largs, Auchmantle, " Polteriar, and Auchinvan, which are pairts and pertinents of " the said fyve-merk land of Meikle Largs, with houses, " biggings, yairds, woods, fishings, pairts, pendicles, and perti- " nents therof, lyand within the said parichin of Inch, and " shirriffdome forsaid, quhilks pertainit to umq^l^. John, Earle of " Cassills, ffather to John, now Earle of Cassills, for the saids " lands of Cults, with the pertinents, whilks pertainit to umq^le^. " Fergus Lyne of Little Largs, with this provision and condi- " tion alwayes, that if it should happen the saids lands of Cults, " with the pertinents, to be evicted from the said umq^le^. Earle " of Cassillis, his aires or assigneys, or the saids lands of Meikle " Largs, and others forsaids, with the pertinents to be evicted " from the said umq^le^. Fergus Lyne, his aires or assigneys, that " then and in that case the said umq^le^. Earle, and his forsaids, " and the said umq^le^. Fergus Lyne and his forsaids, ffra whom " the said lands should happen to be evicted, should have full " and free regress in and to the respective lands abovewritten, " disponed by them to others in manner mentionat in the origi- " nall rights and infeftments therof." The disponee in this conveyance made up his title to Inch and the other lands, with the exception of Cults, by expeding a crown charter upon the procuratory in his disposition.

In 1699, William Linn, (*Lyne*,) the superior of the lands of Cults, executed a disposition in favour of Sir John Dalrymple, then Viscount Stair, " and his aires and assigneys whatsomever," of " all and haill y^e^ superiority of the lands of Cults, lying " within the parochin of Inch, and shriffdome of Wigtoun, " holden be him of me in ffew."

For some reason or other the disponee, in this conveyance, afterwards first Earl of Stair, did not, in his lifetime, make up a title, either to the property of the lands of Cults under the

disposition of 1677, or to the superiority of these lands under this disposition of 1699.

The *first* Earl died in 1707 and was succeeded by his son John, the *second* Earl, who, in that year, expede a special service "as eldest lawful son, and lawful and nearest heir male of line, "tailzie and provision," to the first Earl, in a variety of lands forming the family estate particularly enumerated, Cults not being of the number. After this enumeration, the retour of this service continued in these terms:—"Et similiter in totis "et integris quinq. mercat. terrarum de Meikle Largs Auchin- "mantle Polteriar et Auchinvan quæ sunt propriæ partes et "pertinen. dict. quinq. mercat. terrarum de Meikle Largs cum "domibus edificijs hortis molendinis silvis piscariis partibus "pendiculis et pertinen. earund. jacen. infra parochiam de Inch "et vic. de Wigtoun antedict. una cum summa decem librarum "monetæ hujus regni annuæ feudifirmæ dict. demortuo Joanni "Comiti de Stair de ijsd. solut. et debit. et hoc pro compensa- "tione talis summæ decem librarum annuæ feudi divoriæ per "illum solut. et debit. de tribus. librat. terrarum de Cults "jacen. infra dict. parochiam de Inch et Vic. de Wigtoun ante- "dict. quæ datæ erant in excambionem et permutationem dict. "quinq. mercat. terrarum de Meikle Largs cum dict. terris de "Auchmantle Polteriar et Auchinvan quæ sunt partes et perti- "nen. earund. modo et forma particulariter mentionat. in dispo- "sitione per Joannem Comitem de Cassills Joanni Domino "Bargany fact. et concess. ad quam dict. demortuus Joannes "Comes de Stair jus habuit, &c. &c." Upon this retour his lordship expede a Crown charter of resignation, which, after enumerating the lands specified in the retour, contained the same clause that has just been quoted.

In the same year the *second* Earl expede a general service as heir male and of line to his father.

In 1707, and also in 1739, the *second* Earl executed two several bonds of entail of a great variety of lands, Cults not

eing mentioned further than by a repetition in each of the ntails of the words which have been quoted from the retour f his lordship's special service. The entail of 1739, however, ontained an obligation in these terms:—"And farther, we do hereby bind and oblige us and our heirs, as well male, tailzie, conquest and provision, as heirs general and of line, and successors whatsomever, renouncing the benefit of discussing our said heirs in order of priority, to obtain ourselves duly and lawfully infeft and seased in the lands, teinds, baronys, and others hereafter mentioned, and all other lands, teinds, and estate pertaining to us wherein we are not as yet infeft, and that in such way and manner as shall be most agreeable to the laws of this kingdom; and being so infeft and seased, to make due and lawful resignation thereof in the hands of our immediate lawful superiors of the samen, or their commissioners in their names, having power to receive resignations thereof, and to grant new infeftments thereupon, in favours and for new infeftments of the same, to be made, given, and granted to ourself, and the heirs-male lawfully to be procreate of our body; whom failing, to the other heirs of tailzie and provision before and after mentioned."

On the 20th March, 1746, the second Earl executed another ond of entail and a procuratory upon the narrative that arious changes among the heirs called to the succession by he deeds of 1707 and 1739, had determined him to revoke the ame "with regard to my lands and estate." This deed set out rith disponing "all and whole my lands, baronies, milns, fishings, teinds, patronages, and other heritages whatsoever, presently pertaining and belonging to me, or that shall happen to pertain to me at the time of my decease;" and fter enumerating lordships and baronies, embraced numerous arcels of land by their several descriptions, many of them tated to be lying "within the parish of Inch and sheriffdom of Wigton." Among the rest it contained the following

description:—" And sicklike, " All and Haill the five-merk land " of Meiklelarg, Auchmantle, Poleregan, and Auchinvian, which " are proper parts and pertinents of the said five-merk land of " Meiklelarg lands of Glenterrow and Craigochs, with houses, " biggings, yairds, woods, fishings, parts and pendicles of the " same, lying within the parish of Inch and sherriffdom of " Wigton, together with ten pounds Scots of few-dewtie, and " payable out of the same to the Earl of Stair yearly, and that " in compensation of the like sum of ten pounds Scots of " few-duty yearly, due and payable out of the three-merk land " of Cults, with the pertinents, which were given in exchange " and permutation for the foresaid five-merk land of Meiklelarg, " Auchmantle, Poleregan, and Auchinvian, as is more parti- " cularly mentioned in the disposition of the same, made " and granted by John, Earl of Cassils, to the deceast John, " Lord Bargeny, and to which the Earl of Stair has right;"— " And likewise, All and Haill the lands and islands commonly " called the Inch, with the mannor-place within the said " island, with the lochs and fishings in the said loch and " castle within the said loch commonly called Castle Kennedy, " and haill pertinents of the same;" but further than this it was altogether silent as to the lands of Cults, either by particular name or by description. The dispositive clause concluded with the following general words, "together with " teinds, parsonage and vicarage, of the lands, lordship, bar- " ronys, and others above written, and all right, title, interest, " claim of right, property, and possession, as well petitor as " possessor, which we or our predecessors or authors had, " have, or any ways may have, claim, or pretend thereto, or to " any part or portion thereof, in time coming, and all other " lands and heretages presently belonging to me, or that I shall " hereafter acquire during my life, together with all right, title, " interest, claim of right, property and possession which I " have, or any ways may have, claim, or pretend thereto in " time coming."

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In July, 1746, the Earl expede a Crown charter upon the procuratory, in the last-mentioned entail. He did not, however, take infeftment on this charter, but assigned it to his nephew, Captain Dalrymple, and the other heirs of entail. In November, 1747, Captain Dalrymple completed his titles, under the entail of 1746, by taking infeftment in the lands contained in the Crown charter; and in the same month, he put the entail and assignation of the procuratory upon the register of entails; and in September, 1752, he expede a general service, as heir of tailzie and provision to his uncle, who had died in May, 1747.

After the second Earl's death, he was succeeded in his titles by two successive Earls of Dumfries—the *third* and *fourth* Earls of Stair. Upon their deaths, Captain Dalrymple became the fifth Earl of Stair.

The *fifth* Earl, upon the death of his uncle, and before he succeeded to the title, entered into possession of the whole lands which had been possessed by the *first* and *second* Earls, the lands of Cults being of the number, and he continued in the enjoyment of this possession until his death, which happened in the year 1789. During this possession, he, in the year 1786, executed an entail, which will be mentioned afterwards, but need not be set forth.

John, *sixth* Earl, expede a general service, as only lawful son and nearest heir male, and heir of taillie and provision to the *fifth* Earl, his father. Upon the retour of this service, and the procuratory in the conveyance of the superiority of the lands of Cults, by Linn in 1699, which had never before been executed, he expede a Crown charter of resignation, which conveyed a variety of lands:—"Et similiter terras et insulam vulgo vocat. The Inch "cum maneriei loco intra dict. insulam cum lacubus et pisca- "tionibus intra dict. lacus et castro intra dict. lacum vulgo vocat. "Castle Kennedy et integris pertinen. earund, &c. Ac etiam "totas et integras terras de Cults cum pertinen. jacen. intra

" parochiam de Inch et vicecomitatum de Wigton. Quæquidem " Comitatus Dominium terræ decimæ aliaque prædict. content. " sunt in dispositione et literis talliæ execut. per dict. demor- " tuum Joannem secundum Comitem de Stair de data vigesimo " die Martii anno millesimo septingentesimo quadragesimo " sexto."

In the quæquidem clause of this charter, the title to the lands of Cults was thus deduced:—" Et dict. terræ de Cults " virtute procuratoriæ resignationis content in dispositione " earund. fact. et concess. per dict. Gulielmum Lin ad et in " favorem Joannis primi Comitis de Stair inibi designat. Joannis " Vicecomitis de Stair ejusque hæredum et assignatorum quo- " rumcunque de data vigesimo die mensis Aprilis 1699 et " registrat. in libris Sessionis vigesimo nono die mensis Augusti " 1785 cui dict. Joannes secundus Comes de Stair jus habuit " tanquam hæres generalis servitus et retornatus dict. demortuo " Joanni primo Comiti de Stair patri secundum generale servi- " tium expedit. coram clavigeris Curiæ Sessionis decimo die " mensis Maij 1707. Et ad quamquidem dict. Joannes ultimus " Comes de Stair jus habuit per dict. dispositionem et obliga- " tionem talliæ concess. per dict. demortuum Joannem secundum " Comitem de Stair de data vigesimo die mensis Martij, anno " Domini 1746, et generale servitium dict. Joannis ultimi " Comitis de Stair tanquam hæredis talliæ et provisionis " dict. Joanni secundo Comiti de Stair ejus patruo secundum " dict. dispositionem et obligationem talliæ, expedit. coram " Vicecomite Edinburgensi vigesimo secundo die mensis Sep- " tembris, 1752. Et ad quamquidem dict. Joannes nunc " Comes de Stair jus habet tanquam hæres talliæ et pro- " visionis servit. Joanni Comiti de Stair ejus patri in dict. " Tallia secundum generale servitium expedit. coram balivis " Edinburgensibus primo die mensis Julij 1790." In this charter there was a several and distinct *reddendo* for the lands of Inch and the lands of Cults.

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The title under this charter was duly made up by infeftment of date 5th October, put upon record 15th November, 1791, which thus described, among others, the different parcels of land:—

"Totum et integrum Comitatum de Stair dominium et "baroniam de Dalrymple comprehenden. terras baronias mo- "lendina decimas piscationes officia aliaq. postea mentionat. "viz. &c.

"Et similiter terras et insulam vulgo vocat. The Inch cum "maneriei loco intra dictam insulam cum lacubus et pisca- "tionibus intra dict. lacus et castro intra dict. lacum vulgo "vocat. Castle Kennedy et integris pertinen. earundem, &c.

"Ac etiam totas et integras terras de Cults cum pertinen. "jacen. intra parochiam de Inch et Vicecomitatum de Wigton. "Quæquidem comitatus dominium terræ decimæ aliaque præ- "dict. content. sunt in dispositione et literis talliæ execut. per "dict. demortuum Joannem secundum Comitem de Stair de "data vigesimo die Martii anno millesimo septingentesimo "quadragesimo sexto, &c."

The *sixth* Earl under this title entered to the possession of all the lands, Cults included, and continued in the enjoyment of such possession until his death in 1821.

In November, 1821, John William Henry, the *seventh* Earl, made up his title to the family estates by expeding a special service as heir under the entail of 1746. The retour of this service expressed that the preceding Earl had died vest and seised "in feodo totarum et integrarum comitatus dominii "baroniarum terrarum molendinorum decimarum et aliarum "hæreditatum postea specificat. viz. totarum et integrarum "Comitatus de Stair, &c. Et similiter terras et insulam "vulgo vocat. The Inch cum maneriei loco intra dict. insulam "cum lacubus et piscationibus intra dict. lacus et castro intra. "dict. lacum vulgo vocat. Castle Kennedy et integris pertinen. "earundem Totas et integras quinque librat. terrarum de Kil-

" lorpottie, &c. Ac etiam totarum et integrarum terrarum de " Cults cum pertinen. jacen. intra parochiam de Inch et vice- " comitatem de Wigton. Quæquidem Comitatus dominium " terræ decimæ aliaque prædict. content. sunt in Syngrapha " Talliæ execut. per dict. demortuum Joannem secundum " Comitem de Stair de data vigesimo die Martii anno millesimo " septingentesimo qradragesimo sexto: Et similiter totarum et " integrarum terrarum et Baroniæ de Kilhilt comprehenden," &c.

The *seventh* Earl took sasine in the various parcels of land under this retour, and throughout his life enjoyed possession of the whole family estates upon this title.

In making up this title, his lordship had conceived that he derived his title to the lands of Cults under the entail of 1746, and for some time afterwards he continued under the same impression, as he expended large sums of money on improvements of the estate, and upon the lands of Cults among others, which he made a burden upon the succeeding heirs of entail, by proceedings adopted under the Statute 10 Geo. III.

Subsequently, his lordship's pecuniary embarrassments induced him to take another view of the matter, and to endeavour to make a title in fee simple to the lands of Cults. Accordingly he first, in 1822, expede a general service as heir male to John, the *first* Earl, in these lands, and took infeftment in them, omitting in his seisin, all mention of the fetters of entail; but, discovering a defect in this title, by reason of the second Earl having expede a general service as heir male to the first Earl, he, in 1823, expede a second general service and infeftment, as heir male to the second Earl.

After this, his lordship, in 1835, executed a voluntary trust conveyance in favour of Ranken, a solicitor in London, for behoof of his creditors. This conveyance embraced the lands of Inch and Castle Kennedy, and the lands of Cults, by separate and distinct description; and, after enumerating the

different parcels of land, continued thus:—"Which earldom, "lordship, lands, teinds, and others aforesaid, are contained in "a deed of taillie executed by the said John Earl of Stair, "dated the 20th day of March, 1746," &c.

"And in which earldom, lordship, baronies, lands, mills, "teinds, and other heritages before specified, I, the said John "William Henry Earl of Stair, stand duly and legally vested "and seised, in terms of the taillie of Stair, as heir of line, "taillie, and provision therein, to John, last Earl of Stair, my "cousin-german, conform to the several infeftments thereof in "my favour, and all and sundry other lands and heritages what-"soever pertaining and belonging to the Earl in Scotland, or "to which in any way he had right with the whole writs and "title deeds thereof."

Ranken was about to avail himself of the general words of conveyance and the title in fee simple, which had been made up by the *seventh* Earl, as giving him a title to the lands of Cults, and of the power to sell them for behoof of his lordship's creditors, when he was interrupted by an action, at the instance of the present appellant, then the first substitute under the entail of 1746, against himself and his author, asking as its first conclusion, to have it declared that the lands of Cults, "both as "to the superiority as well as the property or *dominium utile* "thereof, are included or comprehended in, and have been "effectually and well and validly entailed by the foresaid deeds "of entail of 20th March, 1746, and 6th October, 1786, the "respective transmissions thereof, the foresaid charter of 5th "July, 1790, and the infeftment thereon dated 5th October, and "registered 15th November, 1791, and the possession follow-"ing thereupon by the said deceased John, sixth Earl of Stair, "and the defenders, the said John William Henry Earl of "Stair, their predecessors and authors, and generally by the "various deeds, instruments, proceedings, and others before "narrated, and the possession following thereupon; and that

"the said lands of Cults and pertinents, both superiority and "property, have been, are, and must be still held by him, and "the heirs and substitutes of entail therein, under and by "virtue of the said tailzies, and the transmissions and investi- "tures thereof, and subject to the conditions, provisions, restric- "tions, reservations, clauses irritant and resolutive, and others "therein contained, and by no other right or title."

The defenders to that action pleaded that Cults was not contained in any registered entail, and that as to the *dominium utile*, there had never been a tailzied infeftment expede therein. Earl William Henry (*seventh* Earl) died during the dependance of this action, and was succeeded to in his titles and estates by the appellant, the *eighth* Earl of Stair.

On the 10th of March, 1841, the Court (vide 3 *D. & B.* 837) repelled the defences, and found "that the title made up "by the late Earl to the lands of Cults in fee simple was inept, "and therefore reduce the writs called for and the disposition "to Mr. Ranken, so far as regards the fee of the estate of Cults, "and under this qualification reduce, decern, and declare in "terms of the reductive conclusions of the libel: farther, declare "in terms of the first declaratory conclusion of the summons; "find that Mr. Ranken has not a sufficient title to maintain the "rights of the creditors under the disposition libelled on and "infeftment following thereon against the estate of Cults."

In April, 1841, the respondent, as executor of a bond-creditor of the *seventh* Earl, brought an action against the appellant, as heir, served and retoured to John William Henry, the *seventh* Earl, concluding for payment of the bond debts due to his testatrix, upon the ground that the lands of Cults were held in fee simple, and that the defender was liable for the debts of his ancestor *in valorem* of these lands.

The appellant, in addition to other defences preliminary and upon the merits, pleaded as his *third* defence:—"The defender "not being the general representative of the late Earl of Stair,

" but representing him only as heir of entail, and to no further " extent, cannot be made liable for his debts and deeds."

This defence he enlarged in his plea in law by a plea in these terms:—" The lands of Cults having been validly com- " prehended and disponed, as part and pertinent of the Stair " estates, under the broad terms of the conveyance in the entail " executed by John the second Earl, in 1745–6, and that entail " having been afterwards duly recorded in the Register of " Taillies, the said lands were thereby effectually protected " against the diligence of creditors, and the registration once " made was not rendered inoperative by the title subsequently " completed in the person of John the sixth Earl, in 1790."

The Lord Ordinary, (*Cockburn*,) on the 2nd of February, 1842, sustained " the third defence, viz., that the defender not " being the general representative of the late Earl of Stair, but " only a succeeding heir of entail, is not liable for his debts or " deeds," and assoilzied. To this interlocutor his Lordship added the following note: " The Lord Ordinary considers the " facts and principles on which this defence rests to be all " fixed by the case of Dalrymple *v.* Stair, 10th March, 1841. " Among other things, he holds Cults to have been held and " possessed as a part of the general entailed estate."

The respondent reclaimed, and the Court, before answer, " and for the purpose of having the opinions of all the Judges " on the question raised by the Lord Ordinary," appointed the parties to put in minutes of debate, which was accordingly done, and very elaborate opinions were then delivered by the consulted Judges.

Thereafter, the Court, in conformity with the opinions of the majority, on the 28th February, 1844, " recalled the interlocu- " tor of the Lord Ordinary, repelled the third defence pleaded " by the defender, and remitted to the Lord Ordinary to " proceed farther in disposing of the other points of the cause " as to Lordship should seem proper."

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The appeal was taken, by leave of the Court below, against this interlocutor.

*Mr. Rutherford* and *Mr. Bethel* for the Appellant.—Although by the disposition of 1699, from Lord Bargeny to the first Earl of Stair, the lands of Cults were conveyed, along with the lands of Inch and Castle Kennedy, as a separate tenement, it was perfectly competent for the disponee to hold them, and to acquire a title to them, as part and pertinent to these lands; there was nothing to prevent this, either in the circumstance of their having been originally separate tenements, or in the relative greater magnitude of Cults to these lands. Fife's Trs. *v.* Cuming, 8 *S. D. & B.* 326, *Stair* II. 3, 73, *Ersk.* II. 6, 3. Young *v.* Carmichael, *Mor.* 9636. Moray *v.* Wemyss, *Mor.* 9636. Magistrates of Perth *v.* Wemyss, 8 *S. D. & B.*, 82. *Craig de feudis, lib.* II. dieg. 3d sect. 24. Until 1699, therefore, when Linn, the superior of Cults, conveyed the superiority, the *property* of Cults was possessed as pertinent to the other lands, and after 1699, both the property and the superiority were possessed in the same way. The possession continued the same at the date of the entail of 1746, and having done so for more than forty years prior to that deed, these lands had become annexed to and incorporated with the general family estate, and were feudally vested by prescriptive title, as part and pertinent to the other lands.

Such being the state of the title and of the possession of the lands of Cults in 1746, the entail executed in that year, when it specified the lands of Inch and Castle Kennedy, by express description, was sufficient to embrace Cults, as part and pertinent to Inch or Castle Kennedy, without any particular express description of the former; at all events, it was sufficient to embrace them by the words of general conveyance.

The charter expede by the *sixth* Earl in 1790, upon the procuratory in Linn's disposition of 1699, was expede only

*ob majorem cautelam*, and did not operate any change upon the title; not only was Cults incorporated as part and pertinent of Castle Kennedy, prior to the entail of 1746, but under that deed a second course of prescription had run, before this charter of 1790 was expede. The expeding of that charter, therefore, was a mere superfluity, a corroborative and supplementary title, which itself stated Cults to be contained in the entail of 1746, and could in no degree weaken the title under that entail.

Even if the charter of 1790 formed a separate independent title, a party is not bound to ascribe his possession to any particular title, when he has more than one in his person. He may ascribe it to whichever he prefers; and in this instance, all omission of Cults, by express description in the different titles made up, while in several of them these lands are mentioned as being contained in the entail of 1746, shows the intention of the family to ascribe their possession to title as part and pertinent. But in any view, as the disposition by Linn, was of the superiority of Cults alone, the charter expede under that disposition, could not affect the *dominium utile* of these lands, which was a separate estate, and thus, on the argument of the respondent, the *dominium utile* still remains upon the personal title, unfeudalized, and in that condition it is not attachable by creditors.

If the title, as part and pertinent, was complete, and if the entail of 1746 was sufficient in its terms to embrace the lands of Cults, as was found by the decision in 1841, what deed, other than that entail, could have been put upon the register, so as to make an effectual registered entail of these lands. That deed was found to be an effectual entail, under which the Earl was bound to possess the lands of Cults. It was duly registered, and it would have been utterly useless to have put upon the register any of the deeds of transmission following upon it. All that the Statute 1685 requires is the registration of the deed or deeds constituting the entail; this done, the statute is satisfied.

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*Mr. Robertson* and *Mr. Anderson* for the Respondent.—The original conveyance by Lord Bargeny, in 1674, disponed the *property* of the lands of Cults, as a separate and distinct tenement to the first Lord Stair and his *heirs male.* In 1699, Lynn, the superior, disponed the *superiority* of the lands to the same party and his *heirs and assignees* whomsoever. Prior to and at the date of the entail of 1746, these two destinations of the property and the superiority of the lands, to two distinct classes of heirs, remained unfeudalized, as no infeftment had been taken upon either of the conveyances.

The entail of 1746, although it contained a reference to the lands of Cults, did not dispone them by name. It did however contain a general clause of conveyance of all lands to which the maker was entitled, and a general assignation of writs and evidents. These clauses were sufficient to pass the personal right to both property and superiority of the lands, and to the procuratory and precept in the titles. *Inter hæredes* this might be good as an entail, and so the judgment of the Court below found in the question with Mr. Ranken, but that judgment did no more. The question, how far the entail of 1746 was effectual as against creditors and purchasers, was left untouched: as against them it plainly was ineffectual, because no infeftment in the lands of Cults by name, was ever taken or put upon the register either of sasines, or of entails, and nothing short of such express mention upon the register will satisfy the Statute 1685. The entail of 1746, therefore, was ineffectual to comprehend the lands of Cults, unless they had been possessed as part and pertinent to other lands, and at the date of the entail had already been absorbed in them, and become feudally vested in the maker of that deed, by prescriptive possession as such part and pertinent.

Lands to be possessed as part and pertinent must necessarily be adjoining those to which they are said to be appurtenant. Here, the only lands adjoining to Cults were Inch and Castle Kennedy, but both of them were greatly inferior to Cults in

extent, so that the notion of absorption—that a larger could be swallowed up by a smaller—is out of the question. With regard to the solitary authority from *Craig*, that discontiguity does not prevent possession as pertinent, the titles to the lands there mentioned, two of which are Nos. 97 and 105 of *Thomson's Retours of Berwickshire*, show that the lands of *Kimmarghame* were not discontiguous to, but were *within* the Lordship of *Preston* and *Bonkill*, and that that lordship was vested in the Earls of Angus. These titles, therefore, deprive *Craig's* doctrine of the authority upon which it is rested, and show that that learned feudist had not referred to the case which he professed to quote.

But if the relative position and extent of the lands had admitted of the plea of pertinent, it is altogether excluded by the acts of the possessors, which negative the notion of any intention on their part to ascribe their possession to such a title. However doubtful it may be which title the *fifth* Earl and the heirs prior to him intended to ascribe their possession to, the acts of the *sixth* Earl, in 1785, in registering Lynn's disposition of 1699, and in 1790 in expeding a charter upon the procuratory in that disposition, which, in the *quæquidem*, stated in terms that the lands had been last vested in Lynn, and as a necessary consequence negatived the idea of their having been vested in the Earls of Stair, as part and pertinent, put it beyond doubt that he intended to ascribe his possession to this separate title. This charter, therefore, with the infeftment upon it, vested Cults as a separate distinct tenement by its own name, for which a specific *reddendo* was made payable and has ever since continued to be paid to the Crown, and the special retours of both the *seventh* Earl and the appellant vested it in them in the same form as a separate tenement. It is evident, therefore, that posterior at least to 1785, the notion of possessing this estate not upon an express title, but as part and pertinent of other lands, was not entertained by any of the possessors, nor

even by the appellant himself, and it would not have been entertained by him now, unless with the hope of defeating this action.

But such a use of the privilege allowed to a proprietor of ascribing his possession to whichever title he prefers, is altogether without precedent or authority. Where a party has been in undisturbed possession of lands, either without an express title, or upon a defective one, the law in support of that possession which it presumes to be righteous, allows him, if the circumstances will admit of it, to ascribe his possession as part and pertinent to other lands to which he has an unquestionable title. But no instance has ever occurred of anything so preposterous as a party who has an unquestionable express title, asserting a privilege to pass that title bye, and ascribe his possession to the uncertain and vague one of part and pertinent; on the contrary, such a course is expressly opposed by the decision in Gray *v.* Smith, *Mor.* 10803, where it was held that, if by both rights the possessor is unlimited fiar, prescription cannot run by possession upon the one title against the other; and the same principle was recognised in Zuille *v.* Morrison, 17 *F. C.* 251. The privilege of ascribing possession to whichever title the possessor prefers, however, has only been allowed in questions with parties seeking to evict upon an alleged preferable title not before asserted, and for the quieting of possession, but was never permitted for the purpose of defeating just creditors—the object in the present case,—the policy of the law being rather to protect their interests.

Moreover, in order to make a title by possession as part and pertinent, the possession must be shown to have been such. This must not only be alleged, but proved. Here there is no allegation on the record, whereby the possession is ascribed to part and pertinent of Inch or Castle Kennedy, rather than to the express title, and there is as little evidence of the fact if it had been alleged; on the contrary, the documents distinctly negative such a title.

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If Cults was absorbed as part and pertinent of the other lands, the absorption, in order to make the entail of 1746 cover it, must have been complete at that date, but the time elapsed did not admit of this as a possibility. In order to acquire a title to land without charter and seisin, by possession of them as part and pertinent to other lands, it is indispensable that there have been charter and seisin in these other lands. In the present case the first charter which was made after the superiority of Cults came into the family, was in 1707, and betwixt that time and the date of the entail in 1746, forty years had not elapsed, and during the whole period prior to 1746, the lands of Inch and Castle Kennedy were held under a destination to *heirs male*, while the superiority of Cults was destined to *heirs whatsoever*.

LORD CAMPBELL.—My Lords, it has been a source of great satisfaction to me, that this case has been argued by Scotch counsel of great learning and ability, who are most intimately acquainted with the subject. We are quite sure, consequently, that everything has been brought before us that could assist us in coming to a right decision. Having heard the arguments addressed to us, at length, attentively and with the respect that was due to the ability and learning they displayed, and which the case itself certainly merited, I cannot but think that our course is a very clear one.

My Lords, we have to deal with this third defence, "The "defender, not being the general representative of the late Earl "of Stair, but representing him only as heir of entail, and to no "further extent, cannot be made liable for his debts and deeds."

*Lord Cockburn*, Ordinary, sustained that defence. The Second Division of the Court of Session reversed his interlocutor, and repelled that defence. Therefore, what we have to consider is, whether upon the arguments and proofs before us, that defence is sufficient or insufficient.

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Now, my Lords, I conceive that the question which that defence raises, is, whether there has been a good registered entail of the lands of Cults. If there has been a good registered entail of the lands of Cults, binding upon creditors, the defence is sufficient; if there has not, the defence ought to be overruled.

The entail that is presented and relied upon, is that of 1746, which does contain words that might constitute a valid entail in general terms *inter hæredes*. But the question is, whether that entail, which was afterwards registered, does contain words that can be considered as a good registered entail, with fettering clauses binding upon creditors.

Now, my Lords, Mr. Rutherford has admitted, as he was bound to do, (and we always have the most candid answers from him, upon which we can implicitly rely), that to make a good registered entail, the lands must be named; that there may be a good entail in general words, without naming the lands; but that to make a good entail that shall be binding upon creditors, the lands must be named.

Now the lands of Cults are not named; but then it is possible that they may be included in other lands that are named, and according to my present view of the law of Scotland, a separate tenement, held under a separate title, may become portion of another tenement, and then by prescription, having become portion of that other tenement under long usage, it would become part of that tenement, either with regard to seisin or with regard to entail. So that a disposition of Castle Kennedy or of Inch, might have carried the lands of Cults, although the lands of Cults were acquired by separate title in 1675 and 1679. But then, my Lords, the party who felt it for his interest to contend that there has been this annexation, or absorption, or mergency, must prove it. He must allege facts, and prove facts, which will show that the one tenement has been occupied, and really, in fact, has become portion of the other, so that the title may apply.

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In this case, my Lords, when the matter comes to be sifted, Mr. Rutherford allows that he has neither alleged nor proved anything to show that in the year 1746, Cults had become portion of Inch or Castle Kennedy. It will not do to talk about the general estate, we must know the particular specific lands to which it is supposed to be annexed. But he says there has been possession. There has been possession, to be sure—but then he might as well say, that it became part of any one of those infinitely various tenements that are enumerated in that deed of 1746. It is contiguous to Inch, but so it is also to various other tenements. Mere contiguity cannot be sufficient to show annexation, or absorption, or mergency.

Then what is there in the entail of 1746 to show that the disposition of Inch would have carried Cults? There is nothing, except that they both had been possessed under originally separate titles by the same family. Then in the year 1746, Cults had not become part of Inch—it was still a separate tenement. I would not look to what has since taken place, for if there had been prescription once operated upon, a subsequent dealing with the estate, could not defeat the effect of that prescription. But it is quite clear that Cults was always regarded as a separate tenement, and that it has been so treated down to the present hour.

By some accident, unfortunate for the present Earl of Stair, in the deed of 1746, Cults is not included by name. But not having been included by name, I am quite clear that according to the established and admitted principles of the law of Scotland, there is no registered entail whatever, of the lands of Cults.

Upon that ground, my Lords, I have no difficulty in advising your Lordships to affirm the judgment of the Court below.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend, in advising your Lordships to affirm the

judgment of the Court below. The case is so clear and simple as to dispense with the necessity of troubling your Lordships at any length, with the grounds of my opinion upon it.

I do say, however, that I go along with the position, so completely yet concisely enunciated by Lord Murray, who gave a very clear summary of the arguments, (lying in no very large compass,) of this case. And I go along with the position maintained by my noble and learned friend. I find the learned Judges who reversed the interlocutor unanimous. An able opinion was given by Lord Jeffrey, to which I subscribe, but I particularly refer to Lord Fullerton's judgment which entirely expresses my own opinion upon the case. I might also refer to Lord Wood's opinion; and Lord Robertson's, who concurred with their views, but entered more fully into the case. There is great weight of authority here on both sides, which made it necessary to hear fully the arguments raised. Lord Cunninghame, a Judge of great experience, I may at the same time also remark, going very fully and elaborately into the case, being in favour of the defence and sustaining the interlocutor, other learned Judges also concurring with him.

My Lords, I have looked, in the course of the arguments to-day and on the two former days, to what has been urged, but I can see nothing to shake me in my opinion that there is not a registration of the estate of Cults, either directly by naming Cults, (for it might be done in either way, as is admitted on all hands,) or by reference or by registration of such other estates as are proved, *de facto*, to have comprehended the estate of Cults, or as being sufficient to fix them. It is clear, Cults is not mentioned by name. An intending incumbrancer could have had no notice upon the Registry of Seisins—he could have no notice upon the face of that record—of the name of Cults.

Then is it proved, in point of fact, (for it is totally a question of fact,) that in 1746 there was such an absorption or annexation of the two together, of Blackacre and Whiteacre,

that the Register of Whiteacre meant the Register of Blackacre. That is just where the case is defective; and the learned Judges I have named of the Inner House were unanimous upon it, that it was so defective, (the consulted Judges I have named having given an elaborate judgment). The Lords *Moncreiff*, *Cunninghame*, and *Ivory*, however, sustained the interlocutor. But this is just where they fail. They do not apply to the facts, they go into legal arguments. But the facts fail them. These Judges overlook the importance of the fact that Cults by name is not registered, and deal rather with legal arguments. The question then shortly reduces itself to this—is it registered? That is a question of fact. I do not find that it is. Therefore I entirely agree with my noble and learned friend, in advising your Lordships to affirm this judgment.

LORD COTTENHAM.—My Lords, I entirely agree in the opinions already delivered by my noble and learned friends. I am satisfied that in order to protect this estate against creditors, it must be shown that it was contained in the entail of 1746. Not being distinctly named or described in that entail, the ground assumed is, that it was comprehended in some of the designations to be found in the deed, as part and pertinent of the estate of Castle Kennedy or Inch. That may or may not be. It no doubt is not disputed, that circumstances may have occurred in that year, 1746, to have made Cults somehow included under the general description of Inch, or incident to it, so as to be included in the entail, and protected by the entail, by the denominations of land to be found in the deed. But of that we have no proof; we merely know the fact that the individual member of the family in the possession of the one was in possession of the other. But of any circumstances necessary to show that it was included in the terms to be found in that deed, or that what was so enjoyed is to be considered as part and pertinent of any land described in that deed, there is

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no proof whatever. I therefore entirely concur in the opinion expressed, that the party has failed in showing and establishing that it was affected by that deed of entail.

I cannot but observe, what is admitted on all hands, that the decision in 1841, that Cults was affected by this entail, was entirely rested upon the general words to be found in the end of the deed. It was held to be affected *inter hæredes* under the words, "all other lands and heritages presently belonging to "me, or that shall hereafter belong to me." But if, in 1746, Cults had formed part of those other estates, the entail would not have been held to be a registered entail binding upon heirs, under those general words, it would have been so held as including Cults in the lands named, and it would have been treated as a registered feudal entail.

But these general words were the ground of the decision. The decision was therefore in effect that Cults was not included as being part of the lands called Inch, or appertinent to Inch, but under such general terms as carried only the personal right, and did not make a feudal entail.

I have no doubt, my Lords, in advising your Lordships to affirm the judgment of the Court below.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

RICHARDSON and CONNELL—W. C. KING. Agents.

[*8th May*, 1846.]

MESSRS. FINDLAY, BANNATYNE and Co., Merchants in London, and partners, and MARTIN T. SMITH, Banker, and ROBERT DEWAR, Merchant in London, *Appellants.*

MRS. DOROTHY DONALDSON, and Others, *Respondents.*

*Consignation.—Payment into Court.*—It is not a proper exercise of discretion, in regard to ordering payment of money into Court, to make such an order, after decree has been made for payment upon production of a title to receive payment, merely on an allegation of obstructions having been thrown in the way of obtaining that title, by the party ordered to pay.

IN the year 1827, the respondent, Mrs. Donaldson and her husband, and the trustees of a variety of deeds in relation to her estate, brought an action against the representatives of her father, the deceased Robert Finlay, John Bannatyne, her factor, *loco tutoris*, during pupillarity, Findlay, Bannatyne and Co., and their partners, merchants in London, and the appellants Smith and Dewar, and other parties, since deceased, trustees under a deed for payment of the creditors of Findlay, Bannatyne and Co. The narrative of the summons in this action was, that Robert Findlay, the father of Mrs. Donaldson, had died in the year 1802, possessed of very considerable property, leaving a son and three daughters; that tutors and curators had been appointed to the other children who had never made up curatorial inventories; that John Bannatyne, as factor, *loco tutoris*, to the respondent, Mrs. Donaldson, had neglected his duties as such, and never had lodged any inventory, nor invested her estate; that a considerable part exceeding 25,000*l.* of the funds of her father, were invested with or due

from the Company of Findlay, Bannatyne and Co., at the time of his death; that the respondent's brother, Robert Findlay, became a partner in that company; that the company had never paid to her father's estate what was owing to it, nor settled any accounts with his executors; that in the year 1826, her brother Robert's estate was sequestrated under the Bankrupt Act, and the firm of Findlay, Bannatyne and Co., and the partners, became insolvent, and conveyed their estates, as a company, and as individuals, to Smith, Leathley, Lynan, Tate, and Dewar, as trustees for payment of their debts. The summons then continued thus: "The pursuer, Mrs. Donaldson, "and the other pursuers acting for her behoof, have the most "direct and material interest to have her claims immediately "constituted against the various parties before specified." That the pursuer, Mrs. Donaldson's share of her father's estate, improperly intromitted with and wasted by the defenders, amounted to 8000*l.* less or more with interest since his death; that Findlay, Bannatyne and Co., and their trustees and assignees, had debts owing to them by parties in Scotland, upon which jurisdiction had been founded by arrestment. Upon this narrative the summons contained conclusions for count, reckoning and payment against the tutors and curators of her brother and sisters and their representatives, and against John Bannatyne, her own factor, *loco tutoris;* and then, as to the other parties, continued thus: "*Tertio*, the said Company o "Findlay, Bannatyne and Company, and John Bannatyne, "Robert Findlay, and Robert Buchanan Dunlop, the individual "partners of that company; and the said Martin Tucker Smith, "William Leathley, Henry Lynan, William Tate, and Robert "Dewar, as the disponees or assignees in trust, of the said com- "pany, ought and should be decerned and ordained, by decree "foresaid, to hold count and reckoning with the pursuers for the "whole sums due and indebted by the said company to the said "deceased Robert Findlay at the period of his death, and to make

" payment to the pursuers of the sum of 10,000*l.*, less or more, " as the share of the said debts pertaining to and claimable by " the pursuer, Mrs. Donaldson, as one of the children and exe- " cutors of her deceased father."

Findlay, Bannatyne and Co., and the trustees for their creditors, put in a joint defence, in which they made the following admission:—" It is denied that any part of the funds of the " late Mr. Findlay were at his death invested in or due by the " copartnery of Findlay, Bannatyne and Company, against " which the present action is brought. That company was " created in the year 1813. It is true that the funds recovered " by Mr. Bannatyne acting for behoof of the late Mr. Findlay's " three daughters, his executors, were placed in the hands of " the company, and that, at their stoppage in 1826, there was " owing to those executors, of whom the pursuer is one, the sum " of 4,149*l.* 12*s.* 1*d.* For the pursuer's share of that sum, she, or " the parties producing a proper title, will of course rank on " the estate of the company and of the individual partners. " The defender, Robert Buchanan Dunlop, is also concluded " against, as having been a curator to the three minor children " of the late Mr. Robert Findlay. This was not the case." And in a subsequent statement of facts, that admission was repeated in this form:—" *Stat.* 3. Mr. Bannatyne, one of the " respondents' partners, recovered and intromitted with certain " funds, the property of the late Mr. Findlay's executors, and " by him the funds so recovered were placed in the respondents' " hands, and the respondents were on this account indebted, " at their stoppage in 1826, in a balance of 4,149*l.* 12*s.* 1*d.* " *Ans.* 3. Admitted that the defenders owe to the pursuers " 4,149*l.* 12*s.* 1*d.*, with interest since Whitsunday, 1826. Denied " that that sum is nearly equal to the amount of the debt owing " by the former to the latter.—*Stat.* 4. Beyond this balance, " the respondents owe nothing, either directly or indirectly, to " Mr. Findlay's executors." These admissions were followed

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up by a plea in law, in these terms:—"In no view are the pur-"suer's creditors entitled to rank on the respondents' estate "for more than one-third of the above balance of 4,149*l.* 12*s.* 1*d.*, "or on the estates of their individual partners for more than "the residue of that third, after deducting what they may have "received from the company estate."

After the record had been completed, but while as yet the pleas upon it for the parties were undisposed of, and no proceeding had been taken for that purpose, the respondents, on the 9th of July, 1831, moved the Court, and, without objection on the part of the appellants, obtained a decree in these terms:—"Having heard counsel for the parties, on the motion for the "pursuers for an interim decree, decerns in favour of the pur-"suers against Findlay, Bannatyne and Company, as a company, "and John Bannatyne, Robert Buchanan Dunlop, and Robert "Findlay, all individual partners thereof, and against Martin "Tucker Smith, William Leathley, Henry Lynan, William "Tate, and Robert Dewar, trustees of the said company, for "the sum of 1383*l.* 4*s.* sterling; and allows said decree to go "out and be extracted *ad interim*, the pursuers always producing "before extract a competent title."

The cause was then remitted to an accountant, who in the year 1834 reported that one-third of 4,149*l.* 12*s.* 1*d.*, or 1383*l.* 4*s.* 0½*d.*, and a third of other sums, amounting to 45*l.* 14*s.* 9*d.*, making an aggregate of 1428*l.* 18*s.* 9½*d.*, was owing from Findlay, Bannatyne and Company to the respondents. Various proceedings took place upon this report, the last of which was an order by the Court for letters of incident diligence, at the instance of the respondents, for recovery of documents.

While the cause was in this state, the respondents presented the following note:—"In this process the accountant reported "that a balance of 1428*l.* 18*s.* 9*d.* of principal was due to the "pursuer, Mrs. Donaldson, as at the 26th day of December,

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" 1826, exclusive of interest, as therein stated. No objections " have been stated to that report on the part of the defenders, " and the pursuer's right to the above balance has been " admitted. In these circumstances it is proper that the said " sum and interest thereon should be consigned to abide the " orders of the Court. May it therefore please your Lordship " to move the Lords of the Second Division of the Court to " pronounce an order upon the defenders to consign the said " sum of 1428*l.* 18*s.* 9*d.*, with interest thereon, to remain " subject to the orders of the Court in this process."

The Court expressed the following opinions upon the hearing of this note:—

" *Lord Medwyn.*—Since the interim-decree was obtained in " 1831, for the balance admitted in the defences, an accountant " has given in a report, which ascertains a somewhat larger " balance to be due by Findlay, Bannatyne and Company. " This report is acquiesced in by them. They admit that this " sum is due. The interim-decree was properly qualified by a " condition that Mrs. Donaldson should produce a title. Her " proceedings to obtain that title have been obstructed, not by " any party pretending a preferable right to the sum, or dis- " puting her propinquity, but declining, right or wrong I " inquire not, to concur in the proceedings, which it has been " held must, in the circumstances, be joint by all the sisters. " This obstruction to the acquiring a formal title, when unques- " tionably the right is in Mrs. Donaldson, gives her an interest " not to allow her money to remain in her debtor's hands; and " the question is, whether the interim-decree affords any defence " against the motion now made for consignation. I think it " does not. If consignation were made, this would afford a " most sufficient defence against following out the interim- " decree; but I can see no ground for holding that the decree " affords any defence against the order for consignation of an " admitted balance larger even than that contained in the

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"interim-decree. This is a sufficient reason for preferring following out the latter rather, than the former; and provided "both are not insisted in, the defenders have no right to resist "the latter rather than the other. The object is to resist both. "It does not make the admission under the report less availing "that a decree has been given for very nearly the same amount, "which circumstances prevent the party from enforcing at "present. It is said that the party against whom the order is "craved is an insolvent company, and therefore that it should "not be pronounced, because it cannot be obeyed. This "reason would be equally sound to prevent decree being pronounced. But I never heard of this allegation being held "sufficient in such a case. Here we have no commission of "bankruptcy: in that case of divestiture of their property, we "would call upon the assignee to appear, and failing his doing "so, decree would be given against the bankrupts' estate, and "the bankrupts individually; and they would obtain such protection as law gave them. But though the company may "have been insolvent in 1826, and their estate managed under "a private trust-deed, that does not import that the parties "may not have recovered their *status* since; they cannot have "been living idle all this time. They have never paid this "debt. It is still due; and I see nothing in their case why "they should be treated differently from any defenders in "Court, admitting that a sum due to the pursuer has been in "their hands, as it appears, very ill, if at all secured, since the "year 1826, and having no protection from the Bankrupt Acts. "It is high time to have it placed in *manibus curiæ* when we "are just commencing a new course of litigation."

"*Lord Cockburn.*—I am of opinion that this application "ought not to be granted, and that an order for consignation "should be refused. The application is one addressed to the "discretionary powers of the Court. I am not satisfied, in the

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"first place, that the pursuer is in a position which entitles her "to make this motion. I have great doubts of that. But "farther, even if she were, I am of opinion that there are not "sufficient grounds to support it.

"This pursuer, years ago, got a decree *in causa* for the sum in "question. She endeavoured to put in force this decree, and in "doing so, she says she was obstructed by the present defenders. "So she was in one sense,—that is to say, that certain legal "objections were taken to her proceedings, and these legal "objections were sustained, and, I am bound to hold, rightly "sustained by the Commissary of Lanarkshire. His judgment "must be held as law while it remains unaltered. So that the "amount of the obstruction complained of is just this, that "she was prevented from proceeding contrary to law. Then "she delays taking any steps to bring that judgment under "review for nine years. In the meantime the amount with "interest is growing, and now amounts to a large sum (some "thousand pounds). After all this delay, she still fails to "enforce, or to endeavour to enforce her decree, but makes the "present application for consignation of the amount, for which "that decree was pronounced. I apprehend a party is not "entitled to enforce both these remedies at once. A decree "is the strongest remedy the law can give, excepting perhaps "consignation. But I do not think that where a party has got "decree *in causa* on the merits of his action, he is entitled to "the other remedy of consignation, merely on the ground that "the case happens to remain in Court on some incidental point. "Suppose a party gets decree on the merits to-day—the decree "becomes final, and the case comes before us next session, "perhaps on the question of expenses—could the party holding "the decree say, that no doubt he had got decree, that is, all "he could get under his action, but that the party would not "pay, and therefore he must have consignation also. I think "not. I do not think consignation applicable to such a case.

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"The following is the doctrine of *Mr. Erskine* on the subject "of consignation. 'Consignation of money,' he says, 'is a "'species of sequestration, by which a sum which is claimed "'by different competitors is consigned or deposited in the "'hands of a neutral person, to be delivered up by him to that "'claimant to whom it shall be adjudged by decree.' This "always implies that there is a dispute about the right to the "fund, and that the consignation is to be prior to decree. "After decree, I do not see that payment can be enforced by "an order for consignation. Now here there is no dispute "about the right to the fund, and decree has been given for it. "No doubt it is an interim decree, but it is a decree on the "merits, and final, as far as that balance is concerned. As to it, "she has got all the remedy we can give her; she got that "remedy thirteen years ago, and I do not think that she can "now be heard, after all that interval, to demand consignation. "I therefore think, in the first place, that the pursuer is not in "a position to make the demand at all, and that even if she "were, the circumstances are not such as to make an order for "consignation proper. But I farther think that we must look "to the probable consequences of this motion. This is an "application to our discretionary power. I admit we are not "to speculate on uncertain contingencies which may follow our "judgments. But, on the other hand, we are not to shut our "eyes to their plain and obvious consequences. Now, this "application is made against parties who this pursuer herself "states to be insolvent in her own summons:—'That in the "'year 1826 the said *Robert Findlay's* estate was sequestrated, "'under the authority of our said Lords, and the said company "'of Findlay, Bannatyne and Company, and the said Robert "'Buchanan Dunlop, Robert Findlay, and John Bannatyne, as "'partners of that company, became insolvent, and conveyed "'their estates, both as a company and as individuals, to Mr. "'Martin Tucker Smith, banker, in London, Mr. William

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"'Leathley, Mr. Henry Lynan, Mr. William Tate, and Mr. "'Robert Dewar, merchants in London, as trustees for the "'payment of their debts.' The parties are thus alleged to be "insolvent before the institution of this action. That is the "averment of the party herself who makes this motion. Now, "this being the case, it is impossible for us to shut our eyes to "the necessary result of this motion. An order for consigna- "tion is a much more stringent remedy than an interim-decree. "The interim-decree may simply be carried out by the ordinary "executorials of the law, but an order for consignation pending "the cause has this effect, that it necessarily stops the party "from proceeding farther in the suit till the order is complied "with, and if it is not obtempered, the result is just that which "follows the failure to fulfil any other order of Court, namely, "decree against the party for default. Now, the order here "proposed is one which the party cannot, and is not entitled to "comply with. In case of a sequestration, it would be perfectly "clear; a trustee on a sequestrated estate could not be "ordered to consign the amount of the debt due by the "bankrupt, because he would say, I have no funds to pay all in "full, and I must divide rateably among all the creditors. I do "not see that this case is at all different; one of the parties has "been sequestrated,—the others are averred to be insolvent, "and their trustees are called as defenders. They can only pay "a dividend. If this motion were for consignation of a divi- "dend on the sum in the interim-decree, it would be different, "but we are asked for an order for consignation of the whole "amount from insolvent parties who cannot pay, and from their "trustees who are not entitled to pay in full. What is the "result? This pursuer will return to us and move for decree, "in respect of non-fulfilment of this order; and for myself, if "such a motion were made, I should hold myself imperatively "bound to grant it.

"I therefore think the motion must be refused.

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"*Lord Justice Clerk.*—In this case an interim decree was "pronounced for 1383*l.*, in 1831, against Findlay, Bannatyne "and Co., and the partners of that company, and the trustees "or assignees who have intromitted with their funds, but "which was admitted to be only against the latter *qua* trustees. "As against the others it was an ordinary personal decree. "The company has not been rendered bankrupt—insolvency of "*all* the partners has never been averred. If there had not "been the obstructions mentioned to us, thrown in the way of "the completion of the title of Mrs. Donaldson, the sum must "have been paid in full. I mention this, because there can be "no distinction between the right to enforce payment in "full, and consignation of the whole sum. Indeed, when "parties are not legally bankrupt, but carrying on expensive "litigations, whether they may be under trust or not, to which "those prosecuting them have not acceded, they must be taken "and treated as able and bound to pay in full, until their funds "shall be shown to be exhausted, or not paid to others after "full notice of this demand.

"Then it turns out that the pursuer is not able, and not "from her fault, to complete a title. I shall assume the opposi- "tion to be by a party over whom the defenders have no controul. "I shall assume the opposition of Mrs. Bannatyne does not "originate with her husband, and that the interest to prevent "and delay payment has no influence in these proceedings. I "am willing to lay aside the terms of the inventory proposed "by Mrs. Donaldson, which turned out to be perfectly harmless, "and to which the usual oath might have been given.

"Still, what sort of defence can these difficulties afford to "the debtors against consignation of that sum admitted to be "due, and for which interim-decree went out in 1831. If "legal difficulties occur, not as to the pursuer being the party "in right of the money, but to the completion of her title, "owing to the proceedings of others who have no claim to the

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" sum due to her, but appear as co-executors, only after that " decree is pronounced, in order to prevent her confirmation, " this is just the kind of case in which consignation is, by the " practice of Court, and the reason of the thing, usual and " proper. The debtor ought not to hold the funds—ought not " to be trusted with the funds—for which interim-decreet went " out, seeing that he has no sort of interest in this unexpected " and strange litigation between the pursuer and those entitled " to join in but thwarting the completion of confirmation. " Pending that dispute, the party liable to pay ought to consign. " I think the case is exactly within the principle of *Mr. Erskine.* " *He* has no right to hold the money, and is the last to be " trusted with it. I think this is a plain and simple matter, " admitting of no doubt. Then the parties told us they could " not consign. Before that excuse can be taken against con- " signation, we must be satisfied on proof that they have not " funds sufficient for that purpose. The averment I cannot " take. That they have funds for carrying on, and have carried " on this most expensive litigation since 1831, is quite sufficient " to prevent me listening to any such excuse. At present the " demand is for confirmation, that is, that they are not to hold, " perhaps, as a means of carrying on this very litigation, the " sum which belongs to the pursuer, and for which there is an " interim-decree.

" It was said that this may be followed up by a demand for " payment. Whether that is to be made or not can be decided " at another stage, and is not now the question.

" When the decree was pronounced it was for the full sum. " The trustees, if they aver that they have not funds to pay in " full, must shew their intromissions, the dates and amount of " payments to other creditors, and the partners who are not " insolvent must find some legal ground for payment not being " made. In the mean time it would be quite ludicrous to allow " these parties who have carried on, and are carrying on most

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" obstinately this litigation, to pretend to say that they cannot " produce the sum in question.

" By the accountant's report, the sum is shown to have been " 1428*l.* in 1826, and for that sum an order for consignation " should be pronounced against all the parties named in the " interim-decree.

" If this had been a sequestration, the law limits the mode " of recovery to ranking, if the party is a creditor. If it is an " action against the sequestrated estate, the trustee must have " funds, else he should not resist. The discussion as to the " obstructions to Mrs. Donaldson completing her title as " executrix, taking entirely and exclusively the account of it by " the defenders themselves, has tended to confirm me in the " result which I formerly stated, that the Court ought not, on " the merits, to relieve Mr. John Bannatyne of his obligation to " make a separate account under the act of sederunt, as factor " *loco tutoris*, and ought to leave him to settle with Findlay, " Bannatyne and Company, for the moneys which, I stated that, " in my opinion, he ought never to have lent to them. And " when the cause returns to us, I trust that point will be " reconsidered."

The following interlocutor was then pronounced, which is the one appealed from:—" Ordain the defenders, Findlay, " Bannatyne and Company, as a company, and John Banna- " tyne, Robert Buchanan Dunlop, and Robert Findlay, the " individual partners thereof, and Martin Tucker Smith, Wil- " liam Leathley, Henry Lynan, William Tate, and Robert " Dewar, trustees of the said company, to consign in the Royal " Bank of Scotland, or in the Bank of Scotland, the principal " sum of 1428*l.* 18*s.* 9*d.* sterling, therein to remain subject to " the orders of the Court, and that on or before the second " box-day in the ensuing vacation.

*Mr. Bethel* and *Mr. Moncreiff* appeared for the Appellants.

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Mr. Bethel had just concluded his statement of the facts and was about to argue the question appealed, when he was interrupted by the House, which called upon the respondents to support the interlocutor appealed from.

*The Lord Advocate* and *Mr. J. Russell* for the Respondents.—The decree of 1831 ascertained that 133*l.* 4*s.* was due from the defenders.

[*Lord Cottenham.*—But not the fund from which it was to be paid?]

The parties not only did not object but consented to this interlocutor. They were bound, therefore, either to pay or consign in obedience to it, or, as regards the trustees, to show that they had no funds in their hands. Then came the accountant's report, which confirmed the interlocutor in regard to the amount which was due. That report was not objected to, nor quarrelled with, in any way. The parties held the report, on the contrary, to be good for them.

[*Lord Cottenham.*—The sum in the interlocutor of 1831 is not the sum in the accountant's report, it is the latter that is ordered to be brought in.]

But no objection was taken to the report; this, therefore, was equivalent to an admission by the parties, of the correctness of the sum reported to be due from them.

[*Lord Cottenham.*—No account was taken against the trustees of the trust monies, but the order is made upon them.]

The decree of 1831 made them liable to pay, unless they could satisfy the Court that they had properly applied the funds come to their hands, and had none remaining. When the order for consignation was asked they should have shown this; the *onus* lay upon them to do so. The truth is, that the trustees had received funds greatly exceeding the sum in the decree. The action was founded upon arrestments of funds exceeding 8000*l.*, all of which have been drawn by the trustees.

[*Lord Brougham.*—Very well, you may ultimately get decree upon that.]

When the Courts in Scotland are satisfied, from admission of the party or the evidence in the cause, that a certain sum will ultimately be due, they are in use, either to give interim-decree for immediate payment, or to order the money to be consigned subject to the orders of the Court.

[*Lord Brougham.*—The rule observed in the Courts of this country is to be found in Richardson *v.* Bank of England, 4 *My. & Cr.* 145. They will not order money to be brought into Court upon anything short of a distinct admission of the party that the money is owing from him: and the reason of the rule is very obvious; for, were it otherwise, the Court might have to hear the whole cause twice over, upon the motion for bringing in the money, and again upon the final hearing. So strongly did *Lord Eldon* feel the propriety of adhering to the rule in one case, Quarrel *v.* Beckford, 14 *Ves.* 177, that although, from the schedule to the defendant's answer, (which is part of the answer,) if a column of figures had been summed up it would at once have appeared what was owing from the defendant, and the plaintiff had done this by an accountant, upon oath, yet his Lordship refused to make the order asked, because it did not appear that the defendant had admitted any specific sum.]

No such rule is propounded in Scotland. If the Court is satisfied, *quovis modo*, that a sum will ultimately be payable, it makes the order which it judges will best secure the fund for the party to whom it is payable. Here the party consented to the decree of 1831, and all that was requisite to enable his opponents to compel payment under that decree was the title of Mrs. Donaldson, as executrix, which the appellants have used every means to obstruct her in obtaining.

[*Lord Cottenham.*—If the trustees had administered their trust, were they to pay this money over again out of their own pockets? How were they to have an opportunity of showing

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that they had no funds in their possession; no account had been taken as against them when the decree of 1831 was made.]

That decree did not prevent them showing this: they could have done so at the time the decree was asked, or at any time afterwards.

[*Lord Cottenham.*—It is difficult to see how upon principle you could go against the insolvent, and in the same suit also sue the trustee for payment of his debts.]

We repudiated the trust.

[*Lord Cottenham.*—Your summons does not repudiate the trust; it seeks a remedy against the trust fund.]

Though in England it would not be competent to sue the trustees without going in under the trust, it is otherwise in Scotland. We were entitled to sue the trustees along with the insolvent, as intromitters with the funds of our debtor. No exception was ever taken upon the ground that they were improperly made parties. If the decree of 1831 was right, and it must be assumed to be so, as it was never complained of, then the order for consignation merely follows up the decree, and is precisely in the same terms with the decree. The decree does not create a personal liability; neither does the order for consignation as against the trustees, for they are merely sued as trustees, and they can at any time relieve themselves by suspension, showing that they have administered all the funds come to their hands. But even if the decree did involve a personal liability, it has never been complained of. The order is in identical terms with it, and therefore cannot either be complained of.

*Mr. Bethel* in reply.—The decree of 1831 was neither in form nor intention more than one of constitution. That was all, indeed, that the respondents asked by their summons. The decree was not made upon a hearing of the cause, but upon motion, and it did not dispose of any one of the defences set up by the parties, which, if it had been a decree for payment, it

would have done; these were left to have their full effect upon the record. The trustees did not undoubtedly object to the decree in the form in which it was made, because they had no interest to do so. They admitted their liability to account, but only for the trust estate, and the decree only ascertained the amount for which the respondents were entitled to inforce that liability; but the order for consignation imposes a personal liability upon the trustees without regard to whether they may or may not be in possession of trust funds. There is nothing upon the record showing either the amount of funds come to their hands, or how they have been administered, or the sum for which the trustees are bound to account. But if the decree be viewed as one for payment, as contended for by the respondents, it exhausted the summons so far as regarded the sum contained in it. Any further proceeding in Court in regard to it was incompetent. It then lay with the party to extract the decree, and enforce it by the ordinary diligence of the law. But even if further proceeding in Court were competent, the decree and the order are, in truth, conflicting. By the decree the money is to be paid to the party, and by the order, which does not recal the decree, it is to be paid to the Clerk of the Court.

LORD BROUGHAM.—My Lords, I really should be sorry to occupy your Lordships' time by going at any length into this case, in moving the judgment of your Lordships that you should reverse this order, because we have so often in the course of the argument referred to the grounds upon which that reversal must proceed, and to the total inadequacy of the grounds stated for the decision of the Court below, both as regards the want of any specific ground for ordering the money to be paid into Court, and as regards the position of the parties chiefly implicated in this order, namely, the trustees of the sequestrated estate, or under the insolvency, (if there was no insolvency, I care not—I

care not which it be,) who were only in a representative capacity as representing the fund, and who have not admitted that fund to be in their hands, or that they are liable to pay if the debt was constituted against the party. We have so often adverted to those grounds, and they appear to me to be so clear, that I think it unnecessary to say more than that I entirely concur in the opinion of those who think that this interlocutory order cannot possibly stand.

I am anxious, however, to guard myself against its being supposed that I desire to lay down any general rule respecting the payment of money into Court, or as to the force and effect of decrees of consignation, or the force and effect of an interim decree. I do not at all proceed upon that, but upon the general principle, that if there was a discretion here, which all such orders assume, it was not properly exercised in the present case. We lay down no English rule for the government of the Scotch Courts in this matter, but proceed upon this simple ground, that this being a matter in the discretion of the Court, and the Court having a right to exercise that discretion to the effect of ordering payment of money, there was not a sufficient medium *concludendi* whereupon they ought to have proceeded in the exercise of that discretion, especially with regard to persons filling these peculiar situations. I mention this that, it may not be supposed that we are interpolating the English practice into the Scotch Courts.

LORD COTTENHAM.—My Lords, I am entirely of the same opinion. If it were necessary to give any opinion as to the rules which regulate consignation in Scotland, I should have felt great difficulty in coming to any conclusion in the present case adverse to the opinions expressed by a majority of the Court below; for in the first place our information upon that subject has been very scanty with reference to any authorities on which to rely; but I find so much of principle involved in

this interlocutor, applicable to a case of pure discretion in the Court, that without at all adverting to the points of practice which have been discussed, or to the construction to be put upon the interlocutor of 1831, or to the effect in point of practice of the order 1844. But looking at it merely as an exercise of the discretion of the Court, I am so satisfied that that discretion was not properly exercised, that I quite concur in the opinion which has been expressed by the noble and learned Lord, that the interlocutor in this case ought not to stand.

Whatever may be the true character of the interlocutor of 1831, it at least declares certain rights of parties as creditors against those who are their debtors, and against certain other persons who are alleged to have trust-funds in their hands, under a deed of trust, the object of which was to make payment among the creditors of that trust. That interlocutor, from the want of the title of the pursuer being completed, from 1831, when the interlocutor was pronounced, to 1844, could not be carried into effect. There was a defect in the title which prevented the party from having the benefit of that interlocutor. Pending that defect of title, the same infirmity remaining in 1844, as existed in 1831, an order was made to pay the money into Court.

Now according to the usual course of proceeding in Scotland, as in any other country, there is a certain process known by which the orders of the Court are to be enforced. That process could not be resorted to under the circumstances of the parties in whose favour the interlocutor of 1831 was pronounced. But this could not constitute a ground for departing from the usual course, and for that reason, and that reason alone, doing that which to the defenders is equally prejudicial, namely, compelling them to pay money into Court, in order to take the money out of their hands.

It would be strange that because you cannot have the benefit by a regular interlocutor, you are to have recourse to an irre-

gular or discretionary proceeding of the Court, to compel the party to pay money into Court. That appears to be one of the grounds in the minds of those who pronounced this interlocutor, and it is rather assumed that proceedings have taken place, which continue the impediment to the pursuer's completing his title.—That was *dehors* the cause. Whatever may have been the history of that proceeding, or whether the defenders were connected with those difficulties, is a matter which it was impossible for the Court in which the interlocutor was pronounced to enter into the discussion of. If that be not a ground to support this interlocutor there is nothing else, for the matter remains as it was in 1831, in every other respect.

Then we must look to the practical effect of this order. Whether the parties could or not have the means of protecting themselves against it by applying to the Court by suspension is argued by Mr. Bethel very properly. They could only do so by transferring their trust account from the country, in which it was constituted into another country, merely because the pursuer has there made them parties to this cause, and if it is to operate indirectly as a compulsory means of making them do that, this would be of itself a strong objection to the order which has been pronounced. We do not know whom we might be injuring by such a course. Many other persons are interested in this trust fund, and the effect of this would be to transfer all the administration of the trust here to the jurisdiction of the Court of Session, which may or may not have the means of doing justice between the parties in the administration of the trust fund. If it is to operate as a compulsory process to make the parties pay in all events, it would be obviously unjust, for nothing passed in the cause to show their liability or the right of the pursuers to take out of their hands that which remains in their hands for the purpose of being administered under the deed which constitutes the trust.

These are the great difficulties which occur in coming to a

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conclusion upon the question, whether the discretion vested in the Court below, has been properly exercised or not? These proceedings are quite adverse to our notions of the manner in which the jurisdiction of Courts is regulated in this country as to paying money into Court. Looking only to what we are told by the Judges, this is a matter of pure discretion, the exercise of which is supposed to be justified by the extraordinary circumstances existing in the present case. I am clearly of opinion that the circumstances stated do not justify it.

LORD CAMPBELL.—My Lords, I am very glad that my noble and learned friend, who first addressed your Lordships in moving this judgment, cautiously stated, that this House lays down no rule whatever with regard to consignation. It is a rule, and a very salutary rule in the Courts in England, that they will not order money to be paid into Court unless there be a clear admission of the money being in the hands of the party, because, otherwise, they would be trying the cause twice over. They could not safely, if there be any contest, make such an order without hearing the opposite side, and hearing a reply, and coming to a conclusion upon the whole matter before them. But though such is the law and practice in England, we do not, by any means, say that that law and that practice shall be adopted in Scotland, though we have great reason to regret that no rule of the kind does prevail there, and that it is a mere matter of discretion in each particular case, but, such it being, such we of course allow it to remain.

But, my Lords, looking to what has been done in this case as an exercise of discretion, it seems to me clearly, after all we have heard upon the subject, that the discretion has not in this case been soundly exercised, because as it appears to me, if the law of consignation is at all applicable, I know of no instance to which the law of consignation was ever so applied; for it resolves itself into this, that consignation is

made supplementary to process of execution. You cannot have process of execution *rebus sic stantibus*, and you then resort to consignation. It seems to me that that was never done before—that it would lead to very inconvenient consequences in this case, and that it would be a very bad precedent to establish.

For these reasons I agree with the opinion already expressed by your Lordships, that the order should be reversed.

[*Lord Brougham.*—This decision only removes this interim order out of the way, and then the cause will go on just as before. We say nothing upon the merits in any respect.]

Ordered and adjudged, That the interlocutor complained of in the appeal be reversed.

OLIVERSON, DENBY, and LAVIE—LAW and ANTON, Agents.

[22*nd May*, 1846.]

THOMAS SCOTT, residing in Edinburgh, *Appellant.*

JOHN LETHAM, Baker, in Edinburgh, *Respondent.*

*Jurisdiction.—Sheriff.—Small Debt Act*, 1st Vict. cap. 41.—*Execution.*—The Sheriff at Common Law has power to grant a warrant of open doors, and the Small Debt Act, although in prescribing the forms by which its provisions are to be carried into effect, it omits the form of such a warrant, does not impair the original jurisdiction to grant the warrant.

*Diligence.—Execution.*—A return by a Sheriff Officer that he is unable to execute a poinding by reason of lock-fast places, is not an execution within the meaning of the Act 1686, cap. 4, and does not require to be signed by witnesses.

THE respondent obtained from the Sheriff of Edinburgh a summons, under the Small Debt Act, 1 Vict. cap. 41, against the appellant, for payment of 7*l.* 15*s.* 4*d.* The appellant not appearing on expiry of the diet of compearance, a decree in absence was issued against him, finding him liable in the sum sued for, and giving warrant for execution in these terms:—"Decerns and ordains instant execution by arrestment, and "also execution to pass hereon by poinding, and sale, and "imprisonment, if the same be competent after a charge of ten "free days."

This decree was put into the hands of a sheriff officer, who gave the appellant a charge for payment. The charge having been disobeyed, the officer was instructed to execute a poinding of the appellant's effects. For this purpose he proceeded to the dwelling-house of the appellant, but was unable to obtain admittance. The officer then indorsed and signed upon the decree the following application:—

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. "*2d March*, 1842.—Having proceeded to the premises "occupied by the within designed Thomas Scott, Scotland "Street, Edinburgh, for the purpose of effecting a poinding by "virtue of the within decreet, but could not get access therein "on account of lockfast doors,

"May it therefore please your Lordship to grant warrant of "open doors and lockfast places.

"(Signed) WM. ROBB, Sh.-Officer."

The Sheriff granted the warrant asked by a fiat in these terms:—

"*Eo. die.*—Warrant granted as craved. G. TAIT."

Under the authority of this warrant, the officer forced and entered the dwelling-house of the appellant, but not finding goods sufficient to satisfy the debt and costs, he did not execute any poinding.

Thereafter the appellant brought an action against the respondent before the Court of Session, concluding for reduction of the warrant of open doors granted by the Sheriff upon these grounds, that the Sheriff had no jurisdiction under the 1st of Vict. to grant it, and that the warrant itself was illegal, because the return of the officer upon which it had been obtained, was not tested.

The respondent pleaded in defence, a denial of the Sheriff's want of jurisdiction, and admitted "that the application for the "warrant must be held to have been made to the Sheriff acting "under the Small Debt Statute, but without prejudice to the "defender's plea as to such an application having been unne-"cessary."

The Lord Ordinary (*Wood*) ordered minutes of debate to be boxed to the Court, and upon advising these, and hearing counsel, the Court, on the 20th March, 1844, sustained the defence of sufficient jurisdiction in the Sheriff to grant the warrant challenged and assoilzied.

The appeal was against this interlocutor.

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*Mr. Moncrieff* for the Appellant.—It is admitted that the jurisdiction which was exercised by the Sheriff, was exercised under the Small Debt Act. This was a new statutable jurisdiction, not an extension of an already existing ordinary jurisdiction. Every power, therefore, not expressly given must be taken to have been withheld by the legislature. Where a peculiar jurisdiction is given by statute, the statute is strictly construed, and the jurisdiction is not extended beyond what its terms warrant. No clause of the statute gives any authority for granting the warrant which was issued here; and in the schedule to the statute, there are specific forms for every step of procedure for enforcing its provisions; nothing, therefore, is left to implication in regard to the mode in which the jurisdiction conferred is to be explicated, every form is the subject of express enactment, but in no part of the schedule is there any form of a warrant of open doors. The statute not only defines the cases in which the jurisdiction is to be exercised, but the procedure by which it is to be enforced. It is as little competent, therefore, to deviate from the one as from the other.

Even if it should be held that the statute did not create a new jurisdiction, but merely enacted a new mode of exercising an already existing jurisdiction; there is no authority for saying that the Sheriff, by the common law of Scotland, has any power to grant letters of open doors; such a power is not necessarily inherent in any Court.

In ancient times as may be seen in *Ross's* Lectures, vol. i. p. 447, there was no power anywhere to grant such a warrant, unless in the case of crimes committed; and although he admits Sheriffs have been in use to grant this warrant, he treats this as an usurpation of jurisdiction; and *Bell*, in his *Com.* vol. iii. p. 9, lays down that under a Sheriff's decree, there was no power to break open lockfast places until the late Diligence Statute directed that a warrant to that effect should be inserted in the Sheriff's warrant of poinding. Till then, he says, if

such a warrant was desired, application to the Court of Session in the Bill Chamber was necessary. There is room, therefore, for the gravest doubts, whether the Sheriff, even in his ordinary jurisdiction at common law, had any power to grant this warrant.

If that be so the House will be slow to import such a doubtful power into a specific statutory jurisdiction, which is silent upon the subject; into a jurisdiction which by the summary mode of its procedure, is restrictive of the debtor's rights at common law, and which ought not, therefore, to be extended. In Wallace *v.* Hume, 13 *S. & D.* 1036, the Court below held that as the summary proceeding authorized by the statute, was contrary to the common law, everything done must be strictly within the statute.

Not only is there no form in the statute for the warrant which was granted, but the mode in which it was granted was inconsistent with the course of procedure laid down by the statute. All that the Sheriff is authorized to sign, is the book of causes containing the entries of the decrees made, which he is to do on Small Debt Court days. The steps of procedure in each case are to be signed, not by the Sheriff, but by the clerk; but here, the Sheriff, not the clerk, signed the warrant, and he did so, not on a Small Debt Court day, the only day on which, under the statute, he had jurisdiction.

II. But, admitting power in the Sheriff to grant the warrant, this could only be done upon the return of a formal execution of lock-fast doors. Even in the execution of a poinding under the authority of the Court of Session, this would be necessary. The execution so returned must be subscribed by witnesses, as required by the Act 1686, cap. 4, in regard to all executions. In practice, this statute has been always held to be applicable to such executions. Accordingly, in *Fraser's* "Office of a messenger," a form of the execution is given with the attestation of witnesses, and a similar form is also given in the office of a sheriff

officer. And in the Small Debt Act itself, the different forms of execution, with the exception of the execution of citation, contain attestations by witnesses. But in the present case, the execution returned by the officer was not signed by any witness.

*Mr. Anderson* for the Respondent.—It has been the inveterate practice of Sheriffs to grant such warrants as the one complained of, in order to enforce their own warrants of poinding, and every Court necessarily must have such power.—*Ross* in his Lectures, vol. i. p. 447, another passage than that cited for the appellant, shows from *Durie*, that magistrates of burghs had, from ancient times, exercised this power, and that Sheriffs had done so since the beginning of the last century; and *Tait*, in his *Justice of Peace*, p. 269, confirms this doctrine, which is further confirmed by the case A. *v.* B. *Mor.* 8231, where it was decided, that letters of open doors could not be granted by the Court of Session upon the decree of a baron, where the Sheriff had not interponed his authority to it.

Moreover, the power of the Sheriff to grant the warrant is assumed by the legislature in the Statute 1 & 2 Vict. cap. 114, which does not give any power to grant it, but merely directs that it shall always be inserted in the extracts of the Sheriff's decrees.

Such being the powers of the Sheriff at common law, the Statute of 1 Vict. cap. 41, made no alteration upon his jurisdiction in this respect. That statute does not create in him a new jurisdiction, but merely regulates an already existing one, neither does it deprive him of any of the powers he possessed in exercise of his ancient jurisdiction; all that it does is to empower him in causes where the sum in question is small, to exercise his jurisdiction in a more compendious way. If this were doubtful otherwise, it is made clear by the 6th clause in the statute, which authorizes the Sheriff to transfer from the roll of causes in his ordinary jurisdiction, to the roll of Small Debt causes, causes in which the sum in dispute has by interim decrees been reduced below 8*l.* 6*s.* 8*d.*

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The statute, therefore, does in fact authorize the granting of the warrant in question, for the 13th section empowers the Sheriff to enforce his decrees by poinding and imprisonment. Either of these proceedings would be wholly ineffectual, unless the judge had the further power to enforce them, by granting warrant of open doors. There is nothing in the statute showing an intention to deprive the Sheriff, in Small Debt cases, of this latter power, which he enjoys for the explication of his ordinary jurisdiction; and in the absence of any enactment to that effect, it must be presumed, that with the jurisdiction given by the statute was given every power necessary for its explication. In this view the power to open lock-fast places may be implied to exist in the warrant to imprison and poind, and an application for a warrant to that effect may be argued to have been unnecessary.

But, however this may be, the officer did not, in the present instance, execute any implied warrant; he made a specific application for an express warrant, and it was under such express warrant that the appellant's premises were forced. If it were inferred, from the absence of any express power in the statute to grant the warrant, and of any form of it in the schedule, that the power which, as already observed, the Sheriff exercises in his ordinary jurisdiction, was withheld, this would lead to the further necessary inference, that in the comparatively insignificant cases contemplated by the statute, the party must apply to the Court of Session for the warrant, which in more important cases, not under the statute, he can obtain from the Sheriff. This is a construction which would be neither reasonable nor convenient.

But it is said further, that the execution of the messenger, upon which the warrant of open doors was applied for, was not subscribed by witnesses, as required by the Act 1686, cap. 4. That statute requires, that "all executions of letters of horning "and inhibition, and others whatsoever," that is, executions

*ejusdem generis*, "should be subscribed by witnesses." But the return of the messenger, in the present instance, was not an execution at all, in any sense of the word. On the contrary, it was a return or certificate that he could not make the execution. There is no authority for saying that such a document requires to be attested; and in Dick *v.* Sands, 7 Dec., 1630, *Durie*, it appears that a warrant of open doors, granted without any return by the messenger at all, was sustained as good.

LORD CAMPBELL.—My Lords, I am glad at last to come to the conclusion which I do very satisfactorily to my own mind, that the interlocutor appealed against ought to be affirmed. I do not think there is anything in the answer which was given under the 30th section which Mr. Crawford was excused from replying upon, because the 30th section merely says, that no decree given by a Sheriff in any case decided under the authority of this Act, shall be subject to reduction, or to any other form of process provided by this Act, on account of any irregularity, or for any informality, or for any reason whatever. But, my Lords, it is impossible to say that this is a decree. This is not an appeal against a decree. This is a question as to the regularity of the process of execution, which cannot with any propriety be denominated a decree.

Well, then, we now come to consider whether this interlocutor can be supported upon the merits. Now, it seems to me that an execution, by breaking open doors, would not be justified under the original decree, because it would appear quite satisfactorily to be the law—that, although upon its being made to appear to a court of competent jurisdiction, that, after the process of poinding, the doors are locked and the goods cannot be poinded, there may be a process granted for breaking open the doors; yet by the common law of Scotland that cannot be part of the original decree, and it is only where under the statute power is given to make it part of the original

decree that that can be done. Therefore, what was done here could not be done under the original decree pronounced on the 10th of November, 1841; and that brings us to consider what is the effect of the warrant for breaking open doors that was granted on the 2nd of March, 1842.

Now, my Lords, it seems to me without any doubt, that, by the common law of Scotland, the Sheriff, having granted a warrant for poinding, when it is made to appear to him that the doors are locked, he may grant a warrant to break open the doors. It has been said that that was not formerly done; but it is clear that it has been done for above a century without any question being made; and, although new authorities have not been conferred on the Sheriff, there is abundant evidence that the Sheriff at common law possesses that power. Well, then, as the Sheriff generally possesses that power, why does he not possess it when he is executing this statute, called the Small Debts Act, which does not confer any additional jurisdiction upon him, but merely regulates the mode of proceeding, and gives certain forms that are to be adopted; and, as at common law he might have granted a warrant for breaking open doors, it being made to appear to him that the doors were locked, there is nothing in the statute to deprive him of that power.

Then comes the objection that when the officer made the application for the warrant to break open doors, it was not witnessed. The burden of showing that that objection is well founded, clearly rests upon the appellant. The appellant does not say that by the common law of Scotland such a return must be witnessed; but he relies entirely on the Statute of 1686, and if he brings himself within this statute, it appears to me that there is nothing subsequent which the legislature has enacted that would relax what this statute introduces.

Now, this statute is merely in these words:—"that all cita-"tions before the Lords in Session and citations before any other "judges, civil or criminal, which by law or custom used to be in

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" writ, and all executions,"—(your Lordships will be pleased to observe the word ' executions,'—" and all executions of letters " of horning inhibition, and others whatsoever," (that is, other executions whatsoever,) " be subscribed by the executor thereof " and the witnesses, otherwise to be null and void."

The question will be, is this an " execution?" Now I think it is not an execution; an execution must mean something done in executing a writ, and unless this writ be executed, there is no execution. Now this is an excuse for not having executed the writ, the writ still remaining in full force. Mr. Crawford very properly admits that the writ was not exhausted, that even after the officer had made the return, if he had gone on his way back, and found the door open, he might have entered and seized the clock, or the bed, or the chairs, or the table, and realized the sum of money that was to be levied. And if he could have done that, the writ was not executed, but remained to be executed. I should apprehend that the Act of Parliament applies only to cases where the writ has been executed, that is, where something has been done which exhausts the force of the writ; and when that has been done, and when the officer is *functus officio*, he is to report to the Court, and the report is to appear in the proper manner—but this being an application to the Court, to enable the party to execute in an effectual manner the writ, which was still remaining in full force, what has been done cannot be called an execution.

Mr. Crawford very properly referred to the 21st section; but that section says, that in all charges, and arrestments, and executions of charges and arrestments, one witness shall be sufficient. That shows that in all charges, or arrestments, or execution of arrestments, one witness is necessary; but this is neither a charge, nor an arrestment, nor an execution of an arrestment.

That being so, it seems to me that the objection is unten-

able; that the Sheriff was perfectly justified in granting this warrant; and that the ground on which the appellant seeks that it should be reduced, cannot be supported.

No doubt the objection is abundantly well raised upon the record, because the summons expressly states, as one of the reasons of reduction, that there was no competent application for the warrant; that the return by the officer was not tested, and was not a proper execution of lock-fast doors. Then we have the return itself. This clearly is sufficient to raise the question; but the objection being raised, I think the objection is untenable, and that the interlocutor ought to be affirmed. I therefore move your Lordships that in this case the interlocutor be affirmed, and I suppose it ought to be with costs.

[*Lord Brougham.*—No, no costs at all in a pauper case.]

*Lord Campbell.*—Then we must regret exceedingly the hard fate of the respondent, that the law of Scotland is to be settled at his cost; but taking a general view of things, it is right that an appellant may appear in *forma pauperis*, and that when he does so, he should not be liable to costs. There was once a very harsh law in England, that when a person suing in *forma pauperis* failed, he was liable to be whipped. The humanity of modern times has changed that law; but still I am sure there will be forbearance in certifying in such cases, because it certainly does lead to great hardship. I do not say it was improper to certify here, because the questions are of great magnitude.

LORD BROUGHAM.—My Lords, I entirely agree in this case that the interlocutor is right, and ought to be affirmed. It at first struck us, with our English law notions, as singular that there should be the course of law which is here stated and assumed by the learned Judges as quite a matter clear and beyond all doubt. But, looking into it, we see that it is so beyond doubt, and the defendant stands on a clearly legal

footing. It is matter of substance in England, but in Scotland it is matter of form, whether that had been done which entitled the parties to execute the process of breaking open doors, because here in England no civil process can issue by possibility to give a right to break open doors, but in Scotland it is a matter of course.

Now, my Lords, I entirely agree that the whole matter here resolves itself into a question on the provisions of the statute, the Execution Act, the Process Act. And in looking into that I entirely agree that this is not such an execution as is contemplated therein and provided for thereby. It is clearly not an execution of the writ by the party entrusted with the execution, it is not even a return, but it is a report as it were interlocutory, and in the main process of proceeding, that he cannot execute the writ without further help; that he has been provided with the writ, but a writ, which from a fact that could not be known before, namely, the lock-fast doors of the defendant's premises—he cannot execute without that which, having no such anticipation, he was not furnished with, and he therefore merely reports the fact and says, "I cannot do this." If he had executed the writ, he would have returned that he had got the man's goods and poinded them for the benefit of the pursuer; but he says, "I cannot do it, I am prevented by an unexpected obstacle;" and being prevented by an unexpected obstacle, he makes a return to the effect that he ought to be helped to get rid of that obstacle. It is not a return, it is only a report that he cannot do what the exigency of the writ requires him to do without further help. That then is not an execution. If it had been an execution the writ would have gone, and he must have had a new writ to execute. But no such thing, it is the old writ which he executes, but he executes it with new faculties given to him on the report which he made on the lock-fast doors. Therefore it is clearly a case in which the statute does not either in substance or form apply.

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I am very sorry that this unfortunate baker has got into such trouble here. Here is a poor man, on a matter of 7*l.* 10*s.*, to be at the expense of settling the law. He had much better been employed in his own lucrative trade. He will find this the least lucrative trade he ever engaged in. I am also sorry we cannot give costs to the respondent, as the other party is a pauper. But I entirely agree with my noble and learned friend, that we cannot blame the counsel for certifying, for there is a point of law, and it is fair to raise that point.

I ought to mention here what ought always to weigh very much on a matter of practice, and which fortifies me in my opinion to agree with the motion to affirm the interlocutor, that all the five learned Judges, who have applied their minds to this case, have clearly an opinion in favour of the decree. The opinion is unanimous, and the Lord Ordinary gives his opinion in a very learned and able note. Lord Moncrieff appears to be the only one who had any hesitation, and he says that hesitation was on account of the judgment being applicable to justices of the peace; but he says that Lord Medwyn has given an opinion that justices of the peace have a right to give warrants to open doors; I do not, therefore, blame the appellant, though, happily for him, by the mitigated severity of modern practice he is not liable to pay in his person. Not that that would have been much compensation to the worthy respondent.

LORD COTTENHAM.—My Lords, I am also of opinion that this interlocutor must be affirmed. It appears to me that by the original jurisdiction of the Sheriff, giving him authority to issue a warrant of poinding, he had all the jurisdiction which is necessary to carry that warrant into effect. The Small Debts Act, no doubt, did not give him jurisdiction, but regulated it and left the power untouched; it does not appear to have interfered with the jurisdiction of the Sheriff in this particular matter, it therefore remains the same as it was before the Small Debts Act,

under the common law, which gave the Sheriff power to do what he has done in this case.

With regard to the point of there being no witness, in order to bring it within the terms of the Act it must be proved to be an execution or return, and it does not appear to have been either the one or the other; and though I should have been glad to have had the opinion of the Court of Session on this point, yet, from what we have heard at the bar, and from the authorities, it appears to me that the provisions of the Act do not apply to the present case.

It is ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House; and that the said interlocutor therein complained of, be, and the same is hereby affirmed.

LAW and ANTON—C. ANDERSON, Agents.

[HEARD 19*th June*—JUDGMENT 3*rd July*, 1846.]

The RIGHT HONOURABLE WILLIAM DAVID, EARL OF MANSFIELD, and GEORGE DRUMMOND STEWART, ESQ. of Braco, in the county of Perth, *Appellants.*

SIR WILLIAM DRUMMOND STEWART, of Grandtully, Bart., *Respondent.*

*Entail.*—Where an Entailer, in exercise of a power reserved in the Entail to alter or revoke, executed a deed which revoked the Entail so far as to free his sons and the heirs of their bodies from its fetters, and contained a procuratory of Resignation for infeftment in favour of a series of heirs, the same as in the Entail, under a restriction that it should not be in the power of the sons or the heirs of their bodies gratuitously to alter the order of succession prescribed by the Entail, in case of its falling to remoter heirs, and under the conditions and provisions of the Entail which were not repeated, *found* that the deed constituted either a revocation or an alteration of the Entail so as of the two deeds to make one entail; and that, not having been put upon record, the lands were free from the fetters of an Entail, as in a question with a purchaser from one of the heirs in possession.

ON the 12th February, 1767, John Drummond executed a procuratory of resignation, and deed of entail of his lands of Logiealmond in favour of the following series of heirs: "to "myself in liferent and fee, and after my decease to the heirs-"male to be procreate betwixt me and Lady Katherine Drum-"mond, second lawful daughter of the deceased William, Earl of "Dunmore, and the heirs-male of their bodies; whom failing, "to the heirs-male to be procreat of my body of any sub-"sequent marriage, and the heirs-male of their bodies; whom "failing, to the heirs whatsoever of my eldest son, in their

" order of seniority, and without division; whom failing, to the " heirs whatsoever of my second or other sons of this or any " after marriage successively, and in their order of seniority, and " without division; whom failing, to Catherine Drummond, my " eldest daughter, and the heirs whatsoever of her body; whom " failing, to Elizabeth Drummond, my second daughter, and " the heirs whatsoever of her body; whom failing, to Frances " Drummond, my third daughter, and the heirs whatsoever of " her body; whom failing, to Mary Drummond, my fourth " daughter, and the heirs whatsomever of her body; whom " failing, to any other daughter or heir-female to be procreat of " my body of this or any after marriage, successively in their " order of seniority, and without division, and the heirs what- " soever of their bodies rexive; whom failing, to Mary Drum- " mond, my sister-german, and the heirs whatsoever of her " body;" and a variety of other substitutes not necessary to be noticed.

This entail was fenced by prohibitory, irritant, and resolutive clauses, but contained a power of revocation in these terms: " saving and reserving to me full power and liberty, at any " time in my life, and even on deathbed, not only to alter the " foresaid course and order of succession, and to revoke all or " any of the conditions, provisions, limitations, and irritancies " before written, innovate or destroy the present right and " settlement of my said lands and estate, either in whole or in " part at my pleasure; but also to sell, alienate, wadsett, and " dispone the lands and others above mentioned, or any part " thereof, and to contract debts thereupon, or even gratuitously " to dispose thereupon, as I shall think fit." The deed was duly recorded in the Register of Entails, and a crown charter of resignation was expede upon it, on which infeftment was taken and recorded.

On the 18th of May, 1773, John Drummond executed another procuratory of resignation of the same lands, which set out with

the following recital: "I, John Drummond of Logiealmond, "heritable proprietor of the lands and barony of Logiealmond "and other lands, specially mentioned in a procuratory of "resignation and deed of entail of my said estate, subscribed "by me upon the 12th day of February, 1767, and whereon "charter under the Great Seal and infeftment hath followed in "my favours, and which deed of entail is recorded in the "register of entails, and in the books of Council and Session— "Considering that since making said entail of my estate, God "hath blest me with the prospect of male succession of my own "body, having now two sons William and Thomas Drummonds, "by my beloved wife Lady Katherine Murray, now Drum- "mond, second lawful daughter of the deceased William, Earl "of Dunmore, and as it may please God that I may have other "sons, I am resolved so far to alter the former deed of settle- "ment and entail of my estate as to leave the heirs-male of my "own body unlimited fiars thereof, except in so far as after- "mentioned, and therefore I, agreeable to the powers reserved "to me by the foresaid procuratory of resignation and deed of "entail, hereby revoke and make void the same, so far as it "may affect the heirs-male of my own body, and the heirs- "male of their bodies, otherwise than as after mentioned." Upon this recital, the granter bound himself to resign the lands by their general designations, "and as more fully specified and "contained in the said deed of entail," "in favours, and for "new infeftments of the same to be made and granted to "myself in liferent and fee-simple, and after my decease to the "said William Drummond, my eldest son, and the heirs-male "of his body; whom failing, to Thomas Drummond, my second "son, and the heirs-male of his body; whom failing, to any other "son of my body in my present or any after marriage, and the "heirs-male of their bodies successively; whom failing, to the "daughters or heirs-female of the body of the said William "Drummond, my eldest son; whom failing, to the daughters

" or heirs-female of the said Thomas Drummond, my second son;
" whom failing, to the daughters or heirs-female of any other son
" to be procreate of my body successively; whom failing, to the
" daughters or heirs-female already procreat, or to be procreat of
" my body successively, in their order of seniority; whom all
" failing, to the other heirs specially mentioned and contained
" in the said deed of entail in the order of succession therein
" set down: but with and under the restrictions, limitations,
" declarations, and clauses irritant after mentioned, viz., that
" these presents are granted by me with the burden of paying all
" my just and lawful debts contracted and to be contracted by
" me, and performance of all my own and my predeceasors'
" deeds and obligations, to whatsoever person or persons; and
" also, that my said sons, nor the heirs-male of their bodies,
" shall in no shape be subjected to, or limited by the foresaid
" deed of entail, and shall enjoy my said lands and estate in
" the same manner as if the said entail had not been made and
" granted by me; but with this limitation and restriction, that
" it shall not be in the power of the said William Drummond,
" my son, nor of any of my other sons, nor in the power of any
" of their heirs-male called to the succession in virtue thereof,
" gratuitously, by contract of marriage or otherways, to alter the
" substitution or order of succession contained in this present
" deed, or in the said deed of entail in case the succession fall
" to remoter heirs by the failure of the heirs male and female
" of my body and their descendants; and with this provision
" and declaration, that if the succession devolve upon daughters
" or heirs-female, the eldest shall succeed alone and without
" division, secluding her sisters from being heirs-portioners with
" her; and that the saids heirs-female, so soon as the succes-
" sion devolves upon females, shall be restricted and limited,
" and fall under the whole restrictions, limitations, clauses
" irritant and resolutive, contained in the foresaid deed of entail
" granted by me, so that the said deed of entail shall, upon the

" succession of heirs-female to my said lands and estate, take " effect in its full force and extent, and in the same manner as " if this present deed had not been granted, it being my sole " intention that my sons, and the heirs-male of their bodies, " should not be further limited by the said entail than not " having it in their power gratuitously to alter the substitution " or order of succession, but that their daughters and heirs- " female, as well as the other substitutes herein and in the said " entail mentioned, should be subject to the said entail and " limited thereby; which several provisions and declarations " herein before mentioned I appoint to be specially insert and " engrossed in the whole charters and infeftments to follow " hereupon, which if any of my said sons or heirs-male of their " bodies fail to do, they shall be subjected to the whole pro- " hibitions, limitations, clauses irritant and resolutive, contained " in the said deed of entail, in the same manner as if these " presents had not been granted: Reserving nevertheless to " myself full power to alter these presents and the said former " entail, and to contract debts, sell, and dispose on the said " lands and estate in what manner I shall think fit."

This deed did not contain either the statutory prohibitions requisite to fence an entail, or any irritant or resolutive clauses; it was never recorded in the register of entails, and no infeftment was taken upon it by the granter.

On the 19th of August, 1776, the granter of these deeds executed a holograph writing in these terms: " Know all men, " by these presents, that I, John Drummond of Logiealmond, " for very honerous weighty causes and reasons, as also con- " sidering the uncertainty of human life, and the infante state " of my children, the situation of my affairs, and the load of " debt my estate is burthen'd with, wit ye me to have made " this deed in order to set aside and annull the tailzie I formerly " made on my whole lands, and tho' registrated in the register " of tailzies, I do by these presents annull, cancel, and revock

" the clauses of tailzie, and all other clauses contained in said " deed of settlement relative to that purpose, and I do here, as " having power, and having reserved the same to myself, to alter " and make void the said tailzie, which I do hereby, leaving " my son William Drummond, and his heirs, whom failing, my " son Thomas Drummond, and his heirs, free of tailzie."

The maker of these deeds died in the same year, 1776, and was succeeded by his son Sir William Drummond, who expede a general service as eldest lawful son and heir of provision of his father, under the deed of 1773, and upon the procuratory in that deed, obtained a charter in favor of himself and the heirs called by it, without any mention of the fetters in the entail of 1767. Upon this charter infeftment was duly expede.

On the 26th of August, 1817, Sir William Drummond by trust disposition which specially recited the entail of 1767, and the deed of 1773, conveyed the lands of Logiealmond to trustees with power among other things, " to feu out such parts " of the said lands and baronies as they shall think proper, upon " such terms and conditions as they shall judge most for my " interest." " And farther, with power to my said trustees, and " the survivors or survivor of them in my name and behalf, to " borrow such sum or sums of money as may be necessary for " enabling them to pay off any debt or debts contracted by me " or my predecessors that may be demanded from them, and " for answering all drafts that shall be made by me upon them, " or upon any cashier to be appointed by them, or that may be " necessary for carrying on the management of my affairs, and " improvement of my said lands and estate, and to grant bills, " bonds, or other securities, heritable or moveable, therefor, " with interest, and under the usual penalties; and to bind " and oblige me, my heirs, executors, and successors, in pay- " ment thereof; and particularly, with full power to my said " trustees, and the survivors or survivor of them, for me, and " in my name, to grant, subscribe, and deliver heritable bonds,

" bonds and dispositions in security, annualrent rights, and " infeftments, or other securities, for the said principal sums, " interest and penalty, over the aforesaid lands and barony of " Logiealmond and others, comprehending as aforesaid, or over " such parts and portions thereof as my said trustees shall think " proper; and which heritable bonds, bonds and dispositions " in security, rights of annualrent, or other securities shall con- " tain obligements to infeft, procuratories of resignation, clauses " binding me and my heirs in absolute warrandice, assignations " to maills and duties, precept of sasine, and all other usual and " necessary clauses, all which shall be as valid and sufficient for " affecting and burdening the lands and others foresaid, and as " binding upon me, my heirs, executors, and successors, to all " intents, and purposes, as if the same were granted by myself, " and shall be ratified, approved, and homologated by me when " required." " Declaring always, that so soon as the debts due " by me and my predecessors, for which I am liable, shall be " paid, and the other purposes of the present trust accom- " plished, my said trustees, and the survivors or survivor of " them, shall be bound and obliged to denude themselves " thereof, and to dispone and reconvey the said lands," " in " favours of me and the heirs-male of my body; whom failing, " to the daughters or heirs-female of my body; whom fail- " ing, to the said Dame Catherine Drummond, now Stewart, " and the heirs whatsoever of her body; whom failing, to " Elizabeth Drummond, second daughter of the said deceased " John Drummond, and the heirs whatsoever of her body; " whom failing, to Frances Drummond, third daughter of the " said deceased John Drummond, and the heirs whatsoever of " her body; whom failing, to Mary Drummond, fourth daughter " of the said deceased John Drummond, and the heirs whatso- " ever of her body; whom failing, to Mary Drummond, sister- " german of the said deceased John Drummond, and the heirs " whatsoever of her body;" and of other heirs which from this

point corresponded with the limitations in the deed of 1773, the part which has been quoted omitting, as will have been observed, after Mary Drummond, the fourth daughter of John Drummond, and the heirs of her body, the insertion of other daughters of John Drummond (to whom a fifth daughter, Louisa Clementina Drummond, had been born), who were embraced both by the entail of 1767 and the deed of 1773. The reconveyance so unprovided for was to be "with and under "the burdens, conditions, and provisions, restrictions, limita- "tions, reservations, clauses irritant and resolutive after men- "tioned, viz., That the heirs before named succeeding to the "foresaid lands, baronies, and others, shall possess and enjoy "the same, by virtue of the said procuratory of resignation and "deed of entail and infeftment following thereupon, and by no "separate or other right and title whatsoever, and shall be "bound to cause, insert, and ingross the same *verbatim* through "the whole course of succession before set down, with the "whole conditions, provisions, restrictions, limitations, clauses "irritant and resolutive after mentioned, in all the instruments "of resignation, charters, and infeftments to follow thereon, and "in all subsequent conveyances, procuratories, charters, ser- "vices, precepts, and instruments, of sasine of the several lands, "baronies, and others foresaid." There then followed the statutory prohibitions against selling, contracting debt, or alter- ing the order of succession fenced by irritant and resolutive clauses. The trustees were infeft upon this conveyance and their infeftment was duly recorded.

On 29th March, 1827, Sir William Drummond died without issue, and his brother Thomas having pre-deceased him also without issue, and there not having been any other sons born to the entailer, Sir William was succeeded by his sister, Dame Catherine Stewart, one of the trustees in the deed of 1817, who expede a service as heir of entail and provision to Sir Wil- liam, under the entail of 1767 and the deed of 1773. In that

character, she granted leases of the lands, and acted otherwise as heiress of entail in possession, but she never took any further steps for completing her title.

In March, 1833, Dame Catherine Stewart died, and was succeeded by her son Sir John Archibald Drummond Stewart, who also was one of the trustees under the deed of 1817.

On the 25th of April, 1834, Sir John Archibald Drummond Stewart, being infeft under the precept in the trust-deed of 1817, and with no other title, executed another entail of the lands which after reciting the entail of 1767, and the deeds of 1773 and 1817, continued thus: "And considering farther, that the "said trust-deed was granted by the said Sir William Drum- "mond with the view of providing for payment of his debts "during his lifetime, and of securing his creditors in the pay- "ment of their debts, out of his said lands and estate, and not "with the view of fettering or restraining the heirs called after "him to the succession of the estate, in the free use, benefit, and "enjoyment of the same, and the right of making up titles thereto, "but subject always to the burden of the debts of the truster, so "long as the same might remain unpaid; and that the said Sir "William Drummond had no power to grant any trust-disposi- "tion, or other deed, which should affect the right of the next "heir to the immediate succession to, and enjoyment of the said "estates, subject always to the burden of the said Sir William "Drummond's debts and onerous obligations—Therefore I am "entitled, and it is now necessary and proper that I should make "up my titles to the said lands, barony, and others, by denuding "thereof as sole surviving trustee foresaid, in favour of myself "and the other heirs called by the said disposition and procura- "tory of resignation, as well as by the said trust-deed; but that "always under the burden of the said debts, and under the "conditions, provisions, and limitations contained in the said "trust-deed. Therefore wit ye me, the said Sir John Archibald "Drummond Stewart, to have given, granted, and disponed, as

" I do hereby, with and under the burden of the debts that were " due by the said Sir William Drummond, and which are still " resting owing, and also under the burden of the debts that " were incurred by his trustees under the foresaid trust-disposi- " tion, all as particularly after specified, give, grant, and dispone, " &c." By this deed, the granter conveyed the lands to the series of heirs in the entail of 1767 and the deed of 1773, with the same exception as in the deed of 1817, viz.: the omission of Louisa Clementina Drummond, the fifth daughter of the original entailer, and the heirs of her body. This entail contained the statutory prohibitions, and was fenced by the usual fetters, but it was never put upon the record of entails.

Sir John Archibald died in the year 1838, without issue, and was succeeded by his brother Sir William Drummond Stewart, the respondent, who made up his titles by deeds embodying the clauses in the entail of 1834, and afterwards in 1842, entered upon a treaty with the appellant for a sale of the lands for 203,000*l.*, which sale was afterwards completed by regular minute.

The appellant, the Earl of Mansfield, apprehending that a good title to the lands could not be made to him by the respondent, presented a suspension as of a threatened charge for the price; and the respondent in consequence brought an action against the other appellant, George Stewart, and the substitutes, under the different deeds which have been mentioned, to have it declared that he had an absolute right to sell the lands and apply the price to his own use.

These two proceedings were conjoined, and thereafter the Court repelled the reasons of suspension, and decerned in terms of the conclusions of the summons of declarator. Appeals were taken against this interlocutor, by the Earl of Mansfield the purchaser, and by George Drummond Stewart, the brother of Sir William Drummond Stewart, the seller; and one of the substitutes of entail, who was an illegitimate son of the respondent, legitimated by the marriage of his parents subsequent to the

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taking of the appeal, was allowed to compear upon it for his interest. When the cause was called, it was stated from the bar, that although Lord Mansfield was appellant upon the record, he was a willing purchaser ready to complete his purchase, upon receiving a good title, and had no interest to quarrel the judgment of the Court below. The counsel for the heirs of entail were therefore called upon to support the appeal.

*Mr. Stuart* for George Drummond Stewart;—*Mr. H. Robertson* for the substitute compearing.

The entail of 1767 was complete in form, and duly perfected by registration and infeftment. Though the deed of 1773 exercised the reserved power of revocation in the deed of 1767, it did so only to the extent of freeing Sir William and his brother Thomas from the fetters. Upon their failure, it declared that the entail should have full operation against the other heirs called by it. If the sons had predeceased the entailer without issue, the deed of 1773 never would have had operation at all, and the entail, on the decease of the entailer, would immediately have taken effect. It is difficult to see then how the circumstance of the sons having survived the entailer can make any difference in the case. There is nothing against principle in a deed being so framed as to give a fee-simple investiture for a certain period, and after that to change it to a tailzied one; and taking the entail and the deed of 1773 together, no more than this was done by them. The effect, therefore, of the deed of 1773 was not to revoke or destroy the entail of 1767, but merely to suspend its operation during the existence of certain parties; when they failed, the entail resumed that operation, which had only been suspended, but had never been destroyed. —Turnbull *v.* Hay Newton, 14 *Sh.* 1031.

In ascertaining the rights of the parties entitled to take, the entail and the deed of 1773 may be taken together as one deed, but that will not make it necessary that both should have been

registered. The fetters were confined to the entail, and when that was put upon record, the statute both in its terms and its policy was satisfied; third parties had thereby intimation of all that they required to know. The deed of 1773 gave immunity from the fetters; that was its only operation; and viewed in that light it was not necessary that it should have been put upon the record, as it could not have served any purpose to make third parties aware of its existence. The entail of 1767 therefore may well stand by itself, though the deed of 1773 was not put upon record, more especially as the circumstances under which that deed could have operation, have ceased to exist by the death of the entailer's sons and their issue. If the effect of the deed of 1773 was only to suspend the operation, not to destroy the existence of the entail of 1767, it is of no importance that Sir William Drummond passed bye the entail, and made up his title, and possessed under the deed of 1773; such possession could not evacuate the entail, by the negative prescription, as the deed of 1773 exempted the heirs male from the fetters of entail; until failure of these heirs, of whom Sir William was one, the heirs to be bound by the fetters of entail, were not in a condition to enforce their operation. The deed of 1773, under which Sir William possessed, so far from conflicting with the entail, expressly recognised its existence. Both the title and the possession of Sir William, therefore, were not only, not in conflict, but were in perfect consistency with the rights of the heirs under the entail during the life of Sir William Drummond.

Although the deed of 1773 perhaps formed the basis of a new investiture, the reference *in gremio* to the entail of 1767, prevented it being an investiture independent of the entail, and preserved the entail as part of the investiture, so that there was no room for the application of the negative prescription. And still further, there was not forty years between 1778, the date of Sir W. Drummond's infeftment, and 1817, the date of the trust-deed, which embodied the conditions of the entail 1767.

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With regard to the holograph writing of 1776, it was not larger in its terms or effect than the deed of 1773; all that it did was to free the sons from the fetters of the entail, and to revoke the entail to that extent and no more; that it was so intended and so understood, is shown by the reference to and adoption of the entail in the deeds made subsequent to its date.

*Mr. Rutherford* for the Respondent.—The deeds of 1773 and 1834 are admitted to be neither of them upon the record of entails, as against a purchaser therefore both of these deeds may be put of consideration as operative entails. The only stay of the parties must be upon the entail of 1767, but that was expressly revoked by the deed of 1773. The effect of this deed was not only to revoke the entail, but to create a new and independent settlement of the lands; it was not a mere exercise of the reserved power of alteration in the deed of 1767, but was a new title in the form of a procuratory of resignation—the form proper for originating a new investiture. It moreover removed the fetters of 1767 from the sons of the granter, and while it continued them against his daughters, and the heirs of their bodies, did not impose upon them, when the succession should open to them, any obligation to make up their titles under the entail 1767, or to insert in their titles the fetters of that deed; all that is to be inserted is the fetters of the deed 1773 itself; the resignation is to be for new infeftment with and under the restrictions and limitations, "after mentioned," which are set out at length. Accordingly Sir Wm. Drummond, the eldest son of the entailer, when he took infeftment upon the deed 1773, inserted in it only the provisions of that deed, altogether omitting those of the deed 1767. Though adopting therefore a part of the old settlement, the deed of 1773 had in itself everything necessary to create a new investiture, the effect of which was to obliterate the old one. Eglintoun *v.* Montgomerie, 2 *Bell's App. Cases*, 149.

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If the infeftment upon the deed 1773, superseded that on the entail 1767, then the latter deed became ineffectual upon this separate ground, that its provisions thenceforth ceased to appear upon the investiture. In short, the deed of 1773 was the investiture under which the estate was held, and as it destroyed the deed of 1767, the only registered deed, entail was at an end, and the lands are unprotected, for the deed of 1773 was never put upon record.

But supposing the deed of 1773, neither to have absolutely revoked the entail of 1767, nor to have formed the basis of a new and ruling investiture, it at all events made an alteration upon the entail of 1767; and whatever in that view might be necessary in questions *inter familias*, it was indispensable, in order to affect purchasers, such as the appellant, that the deed of 1773 should have been upon the record. In this view it constituted at least part of the entail, and to make an entail effectual against creditors or purchasers, it is not enough that part only is upon the record—the whole of it must appear upon the record, otherwise, in the present instance for example, creditors of the sons of the entailer might, by the fetters of the entail 1767 appearing upon the record, have been prevented from affecting the estate of their debtor by diligence, while in truth, these fetters had been revoked by the deed of 1773.

A question was raised upon the argument of this appeal, whether the deed of 1834 was not a breach of the trust in the deed of 1817, and so liable to reduction. This argument is sufficiently noticed in what fell from the Peers to supersede the necessity for any detail of what, when it was ascertained that the deed of 1767 had been revoked, and when the true bearing of the facts of the case upon this argument were ascertained, which was done upon a rehearing of the cause by one counsel of a side, ceased to be of much value.

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LORD CHANCELLOR.—My Lords, it is stated by one of the learned Judges that the case, though one of considerable complexity, in consequence of the numerous deeds connected with it, would be found in the result to be very simple and to resolve itself into very narrow limits.

The question relates to the title of an estate in the county of Perth; Lord Mansfield contracted for the purchase of that estate, and after some little time he was advised that doubts might be entertained as to the sufficiency of the title, and in consequence the purchase-money being of a very large amount,—I think to the extent of upwards of 200,000*l.*,—he was advised to raise a suspension, upon which Sir William Drummond, the vendor, commenced an action of declarator against the subsequent heir of entail. These two proceedings were afterwards conjoined, and the question in this conjoint proceeding is, whether Sir William Drummond, the proprietor of the estate, could, under the circumstances, make a good title to Lord Mansfield.

The first point for consideration relates to the deed of entail dated in the year 1767. John Drummond was the owner of the estate in fee-simple. He executed that deed of entail, entailing the estate upon a series of heirs. That entail was fortified by all the usual and proper provisions, and it was recorded in the Register of Tailzies. It was, in every respect, a complete, valid, and sufficient entail.

The entailer, however, reserved to himself a power of varying or revoking the entail.

A few years afterwards, namely, in the year 1773, he executed a second deed, altering, in many material particulars, the entail of 1767. He freed his two sons, William and Thomas, who, I presume, had been born after 1767, from the fetters of the entail. He not only freed them but the heirs male of their bodies from the fetters of the entail. He, however, declared that they should not have the power of gratuitously charging the estate, in the event of the failure of heirs male of the bodies

of his sons, and the estate coming to remoter heirs. With respect to heirs female, if the estate were to descend to heirs female the succession was to follow precisely according to the provisions of the deed of 1767. Those provisions were adopted by reference to that deed. The usual conditions with respect to the entailing of estates were also adopted in the deed of 1773 by reference to the previous deed of 1767.

The deed, however, of 1773 was not recorded. It therefore could not, in itself, operate against a purchaser for value. Either that deed of 1773 must be considered as revoking entirely, and superseding the deed of 1767, or the two deeds, taken together, must be considered as constituting one entail.

Now it is quite clear that if the deed of 1773 superseded the deed of 1767, and constituted an entirely new entail, (which I myself personally consider to be the effect of that deed,) it would, as against a purchaser, be invalid, not having been recorded. If, on the other hand, it is to be considered that the two deeds together constituted one entail, (which is another view of the case,) then the entail is only partially recorded. As far as relates to the provisions adopted from the deed of 1767 it is recorded; as far as relates to the provisions altered by the deed of 1773, there is no record. Therefore this being merely a partial record of the deed, the entail does not appear to me to be valid within the Statute of 1685.

Now, under these circumstances, a title was made up by Sir William Drummond, who was the son of John Drummond, as the first heir under the deed of 1773, and he continued in possession for upwards of forty years. It is quite clear, therefore, that under that deed of 1773, under such circumstances, the heirs substitute could have no title whatever against a purchaser for value.

But the case does not rest here. There is another most important circumstance in the case. I have mentioned that under the deed of 1767 the entailer reserved to himself the

right to revoke or to vary the deed. Accordingly, in the year 1776, he did, by a holograph writing, absolutely annul and revoke the deed of 1767.

A question had arisen first of all with respect to the authenticity of that instrument. But that has been abandoned. A question was also raised in the Court below as to the effect of that instrument, supposing its authenticity established. That also has been abandoned, and, therefore, by the operation of that holograph writing of the year 1776, which is established by evidence beyond all doubt, the deed of 1767 was absolutely revoked, annulled, and made void. The consequence of which is, that the deed of 1773 was the only deed in existence, and that not being recorded, although the titles were made up under that deed, and Sir William Drummond held for a period of forty years under that deed, the heirs substitute under that deed never could have availed themselves of it, as against what, in Scotland, is called an onerous purchaser.

So far the case is perfectly clear and perfectly free from all doubt, as it appears to me. It is upon those grounds that the case was decided in the Court below.

Under these circumstances, in the year 1817, Sir William Drummond, being in possession of the estate in the manner I have mentioned, executed a trust-deed, by which, intending then to go abroad, he conveyed the estate to certain trustees to take the conduct and management of that estate, and in order that his debts might be paid by them out of it. There was a provision that after the debts were paid they should convey to a series of heirs mentioned in the trust-deed; the series of heirs corresponding, I believe, with one exception, with the previous limitations. However, that is immaterial. It does not bear upon the present question.

The trustees entered into possession, and held the estate subject to those trusts, and after the death of Sir William Drummond, the surviving trustees, agreeably to the provisions

of the trust-deed, conveyed the estate, (the debts being partially paid,) to the series of heirs mentioned in the deed of 1817. They conveyed to that series of heirs conformably to the trust. The first person in the series of heirs was the surviving trustee; he was infeft under the deed. He afterwards died, and the next heir in succession entered, he is the present Sir William Drummond, the vendor of the estate, having sold it to Lord Mansfield. The heirs substitute have no claim as against Lord Mansfield. The deed was never recorded. It can have no operation, therefore, against a purchaser; and it appears to me, under these circumstances, that it is perfectly clear that the title made by the vendor to Lord Mansfield is complete and perfect.

It is said that this was not a valid execution of the trust in some particulars. One of those particulars I shall state. There is no doubt that the estate was conveyed to the series of heirs mentioned in the trust-deed. The trust-deed requires that it should be held under the old deed of entail and the old procuratory. That is, the deed of entail and the procuratory of 1767. Now that deed of entail was annulled, revoked, and put an end to. It had no longer any existence; it could not be again revived. It was impossible, therefore, if that was the intention of Sir William Drummond, to carry it into complete and accurate effect. Therefore we are to assume that that was not his intention, and that the intention merely was, that in those particulars the title should be held under the new deed, but that the conditions should conform as nearly as practicable to the conditions and terms contained in the deed of 1767. It admits, I think, of no other construction.

But there is this observation. It was wholly immaterial, in that particular case, what were the terms and provisions of the deed. It was not recorded. Whatever provisions were contained in the deed, the result would have been precisely the same, as to the controversy between the heirs substitute and a purchaser under the tenant in-tail in possession.

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In addition to which, the heirs substitute have no title whatever, except under the deed of 1834, or under the deed of 1817. If the deed of 1834 was altogether invalid, they go back to the deed of 1817. That deed also is not recorded. They can have no title, therefore, as against a purchaser, either under the deed of 1817, or under the deed of 1834. It appears to me, therefore, that there is no validity in that objection.

Then it is further said, that the estate was not to be sold until the debts were paid, and that the charging the debts upon the estate was in fact injurious to the interests of the heirs substitute. That admits of precisely the same answer. But there is another answer, in point of fact, which was suggested at the bar by Mr. Rutherford, which is this, that under the deed of 1817 the trustees have the power of charging, if they think proper, the debts upon the estate. They therefore only executed that which they had a right to execute under the trust deed, in charging the remainder of the debts upon the estate. It is true they had the power to pay the debts, if they pleased, out of the money received; but they had also an alternative power of charging the debts upon the estate. It seems to me, therefore, that there is no ground for that objection.

Then the only question that remains is this, about which I did entertain for a moment some doubt, can this title ever afterwards be challenged, after a decision of the Court below, confirmed in this House? Can it hereafter be challenged by the heir substitute? Mr. Rutherford satisfied me by his argument, and by his authorities, that it can never afterwards be challenged, if the estate is properly represented in Court. That is all that is required. The judgment is against those persons who represent the estate, and all persons coming after them will, therefore, be bound by this decision. Under these circumstances, I think there is no sufficient ground for this appeal, and that the judgment of the Court below ought to be affirmed.

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LORD BROUGHAM.—My Lords, I am entirely of opinion with my noble and learned friend, who has so distinctly and so accurately stated the case, upon the two several grounds which formed the subject of consideration in the Court below, and upon both of which it has been argued and considered by your Lordships, that it becomes unnecessary for me to detain you at any length.

With respect to the first branch of the case, I think there cannot be, nor has there ever been in my mind, any doubt, any more than there appears to have been in the Court below. But Lord Jeffrey, towards the close of his very ingenious and very able opinion, (as all that comes from him is distinguished by very great ability,) threw out the question whether or not the deed of 1834 had not been such as to amount to a breach of the trusts under which the trustees acted, namely, the deed of 1817. And it is most material, with a view to that, to consider that it was by the deed of 1817 that that very trust was constituted, and that they were bound, if at all, by that deed, and not to go beyond it, either to the deed of 1767, or to the deed of 1773, which, in fact, overruled that deed.

The result of the argument has been completely to satisfy my mind that there is really nothing in the objection. It is quite certain that Lord Jeffrey's mind leaned towards it; for if you look at his opinion, it is clear that he goes further than saying that there is a possibility, for he rather inclines to think that the objection, if taken in time, must have been successful. But, however, be that as it may, that point was not very much considered before his lordship. It seems to have emerged, as it were, in the course of his own consideration of the case, and I doubt whether it was much argued before him. But, be that as it may, we now have the benefit of its having been fully argued before us, and most fully considered by us; and I have come to the result, which my noble and learned friend has stated

that he has arrived at, that there is nothing in the objection, and that we cannot say either that there was any breach of trust committed by that dealing with the estate in 1834, or that there is any possibility of this title subsequently being questioned by the heirs substitute.

First, as to the breach of trust, it is material to consider what deed it was that gave the trustees their power, and against which, if at all, they committed that breach. It was the deed of 1817.

Now, besides the objections urged and sufficiently disposed of by my noble and learned friend in his argument, there is another, namely, that the destination in the deed of 1834 was not precisely the same as in the deed of 1767; but that Louisa Drummond was omitted, who had been called in the deed of 1767. It is quite true that she was called in the destination clause of that deed of 1767. But, besides the observation made by my noble and learned friend as to the force and effect of the deed of 1773, she is not called in the deed of 1817. She is omitted in the deed of 1817. She is just as much omitted in that deed of 1817, which is the governing deed with respect to that question of breach of trust, (for it is the deed which created the trust and constituted the trustees,) as she is in the deed in question of 1834, by omitting her, in which it is said that a breach of trust has been committed.

Then, my Lords, it is to be considered that in that deed (as to the other point, my noble and learned friend has dealt with that,) there are not directions, but powers. There is an option given to the trustees. They might have so dealt with the rents and profits as to have cleared the estate of incumbrances; but they also had the option; they exercised that power, and under that power no breach of trust can be said to have resulted.

Now, my Lords, with respect to the power of the heirs substitute to quarrel this judgment, and to challenge it, and hereafter to upset this title, I am clearly of opinion with my noble and

learned friend. I am satisfied by Mr. Rutherford's authorities, not perhaps by his arguments, but by his authorities, that there is no such power, and that the estate is protected, and the purchaser protected, and effectually and for ever protected, by this decision. It is needless to refer to the cases. There is Dixon *v.* Cunningham, in 5th *Wilson & Shaw*. There is Maule *v.* Maule, 9 *Sh.* 876, a case of very great anxiety, which underwent the very fullest consideration, both by argument at the bar, and then by *Lord Eldon*, and subsequently by myself, who ultimately decided it. Then there is the case of Rutherford *v.* Nisbets, trustees, in 11th *Shaw*, 123; and lastly, a case which, perhaps, bore more upon the present than any other, Macpherson *v.* Dunlop.

My Lords, these authorities perfectly satisfied me, as they have satisfied my noble and learned friend, that the contention on the part of the vendor here in favour of the title cannot be upset by heirs substitute subsequently coming into Court. The estate, as my noble and learned friend observes, is sufficiently represented; and that is all that in this most important and beneficial form of proceeding, a declaratory action, is absolutely essential. Nobody can doubt that here the estate is thoroughly represented, and that whether it is represented by A or B, if it is represented by persons standing in precisely the same shoes, enjoying the same rights, and having the same liabilities, and who are concluded by omitting to state their defences, according to the authority of Dixon *v.* Cunningham, all others, though not called in the action, are precluded.

My Lords, I cannot close my observations in this case without once more expressing my great envy, as an English lawyer, of the Scotch jurisprudence, and of those who enjoy under it the security and the various facilities and conveniences which they have from that most beneficial and most admirably-contrived form of proceeding, called a declaratory action. Here you must wait till a party chooses to bring you into Court;

here you must wait till possibly your evidence is gone; here you have no means whatever, in ninety-nine cases out of a hundred, of obtaining the great benefit of this proceeding. In Scotland you have that benefit; and a more remarkable instance of its beneficial tendency does not exist in my recollection than the present litigation. How would Lord Mansfield have been situated in the case we now have, and how would the vendor of the estate have been situated if they must have waited till perhaps after two or three generations there was a new heir in possession, an heir substitute, and the question was raised? It is most comfortable, it is most gratifying to that noble person, as well as to the other contending parties, that they have had access to the decision of the Court below, and of your Lordships in the last resort, the highest judicial authority, and that he now takes a title which is just as good as if he had an Act of Parliament deciding in his favour, and as secure in the expenditure of his money, and the other parties as secure in taking it.

LORD CAMPBELL.—My Lords, I shall have occasion to add but a very few words to what has been stated by my two noble and learned friends who have preceded me. It gives me great satisfaction to think that, without remitting this case to the Court of Session, we can now come to a satisfactory and final decision.

It seems to me quite clear, my Lords, that the interlocutor appealed from ought to be affirmed. With reference to the main question, which was argued below, I never entertained any doubt. It seems to me quite clear that the deed of 1773 was a new entail; and if that deed had been registered in the Register of Tailzies, it would have regulated the descent of the estate, and would have been a valid and strict entail, binding on all parties. That deed of 1773 materially altered the deed of

1767, and it was felt so strongly at the bar, when we asked the learned counsel where they would draw the line as to withdrawing one substitute, and then another, and at last leaving only some person who was called after the failure of ten or fifty other lines, that really Mr. Stuart found himself almost driven entirely to abandon that. It is quite clear that this deed of 1773 altered materially the former entail, and that it would have been a valid entail, if registered; but, not being registered, it is not binding upon the parties.

Then I own that, for a time, I was very much startled by the objection upon the breach of trust, for it was very broadly asserted at that time—I confess that I had not made myself master of all the details of the deeds—it was very broadly asserted by the counsel, that the deed of 1834, under which the title is now made, was a clear breach of trust, and that Lord Mansfield, having notice of it, all that was done under it might be set aside.

But, upon inquiry, what does it turn out to be? Why, in the first place, you cannot say that the deed of 1834 is void; you can only say that if there were persons who were prejudiced by it, they would have been in as good a situation as if that deed had not been executed. But, upon inquiry, it turns out that there is no one prejudiced by it—neither heirs substitute nor creditors. Therefore, with great submission to what Lord Jeffrey has said, that if there had been an action brought in due time to set aside that deed, there would have been no sufficient ground for sustaining it—it is quite clear that that objection cannot be sustained. This estate is represented by the heir of tailzie in possession. By the law of Scotland the fee is in him. It has been usual in those cases, in such actions of declarator, to call all the heirs substitute; it appears quite clear that, by the law of Scotland, the heir of tailzie in possession does represent the estate; and if there be a suit carried on

*bonâ fide*, to which he is a party, all the heirs substitute are bound by the decision in that suit. Well, then, if this deed was reducible, it lay on the parties who were called in this suit to have brought an action of reduction assimilated to this suit; they have brought no such action, and the decision of the Court of Session in this suit, affirmed by your Lordships' House, must be binding and conclusive upon all parties.

It was suggested at the bar, that an infant had come into *esse*—at least, not come into *esse*, but that he had got a fresh *status* pending the litigation, because, being born before the marriage, his parents had married since, and thereby, undoubtedly, he is rendered legitimate. But that only gives him an opportunity of appearing at your Lordships' bar, and challenging any of the prior proceedings, and arguing the question whether the decision of the Court below is right or wrong. It does not give him an opportunity of beginning *de novo*, and of being in the same situation as if the suit were recommenced, and he were called as a party.

Therefore, my Lords, I have no doubt whatever in my mind upon any part of this important case, and I agree with my noble and learned friend in saying, that I think that Lord Mansfield's title will be good as against all the world. I do not say that he is to be envied; but there is no one that would not rejoice very much under the same title to be Laird of Logie-almond.

[*Lord Brougham.*—I suppose you are all agreed about the costs?]

[*Mr. Mc Neil.*—In the Court below they did not think it was a case for costs, and I am not instructed to move for them at your Lordships' bar.]

[*Lord Brougham.*—It is a sort of amicable proceeding—amicable in one respect, but there has been no collusion or fraud; for it has been as thoroughly argued as if it were most hostile.]

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[*Lord Chancellor.*—The impression upon my mind was that there should be no costs. I suppose you do not ask for costs?]

[*Mr. Mc Neil.*—No, my Lord.]

It is ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed.

SPOTTISWOODE and ROBERTSON—G. and T. W. WEBSTER—DEANS, DUNLOP, and HOPE—Agents.

[HEARD 10*th*, JUDGMENT 13*th July*, 1846.]

WILLIAM MAXWELL, of Cape Town, Cape of Good Hope, and WILLIAM MERCER, his Mandatory, *Appellants.*

JAMES MAXWELL, ESQ., of Brediland and Merksworth, *Respondent.*

*Tailzie.*—Contravention of an Entail cannot be declared by an action, not brought until after the death of the Contravener.

IN this case, the appellant brought an action against the respondent, heir of entail in possession of the lands of Merksworth, alleging that William Maxwell, the father of the respondent, now deceased, had, while possessing the lands under the entail, entered into contracts for excambion of parts of the entailed estate for other lands of inferior value, the excambion having been made as a device to cover long leases upon grassums which had previously been made of the parts of the entailed lands so given in exchange; and concluding to have it declared, that the lease and excambions were made in contravention of the entail, and that William Maxwell thereby lost all right to the lands for himself and the descendants of his body, and that the right of the respondent, as his descendant, was thereby likewise forfeited. The summons did not contain any conclusion for reduction of the leases or excambions.

The Court of Session, (15 December, 1843,) after advising minutes of debate, and hearing an argument at the bar, found, "that a declarator of irritancy to the final effect of resolving the "rights of the descendants of an alleged contravener, cannot "competently be raised and insisted in after the death of the "contravener," and therefore dismissed the action.

This interlocutor, the subject of the appeal, was founded upon the opinion entertained by the Judges in the Court below,

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that the question raised by the action had already been decided in the Bargany case, 1 *Wil. & Sh.* 410, and 2 *Wil. & Sh.* App.; and in Gordon *v.* King's Advocate, *Mor.* 4728, and *Cra. & Stew.* 508. The argument at the bar dealt with the question raised, as if it were still an open one, at the same time that it discussed fully the precedents upon which the interlocutor was founded; but as the House rested its judgment upon the precedents as established, it will not be necessary to notice either of the arguments upon which the appellant asked for a judgment in his favour, as the grounds upon which a judgment for the respondent was given, appear sufficiently from what fell from the Lords who spoke at delivering it.

The *Hon. Mr. S. Wortley* and *Mr. A. Mc Neill* appeared for the Appellant, and cited Stewart *v.* Denham, *Mor.* 7275; Creditors of Gordon *v.* Gordon, *Mor.* 15384; Gilmour *v.* Hunter, *Mor.* App. Tailzie, No. 9; Carnegie *v.* Cranbourn, *Mor.* 10339.

*Mr. Bethel* and *Mr. Anderson* for the Respondent, cited Gordon *v.* King's Advocate, *Mor.* 4728, and 5 *Bro.* Supp. 782; Fullerton *v.* Dalrymple, 1 *Wil. & Sh.* 410, and App. 2, 1 *Sh. App. Cases*, 265; Turner *v.* Turner, 1 *Dow.* 423; Dick *v.* Drysdale, 16, *F. C.*; Mordaunt *v.* Innes, 460, 1 *Sh.* 169.

LORD CHANCELLOR.—My Lords, the first question the House have to consider in this case is, how far the former decision of this House in the Bargany case, does or does not include the question which has been argued at the bar; and certainly, one would have wished to have found that point more distinctly referred to in the ultimate decision of the House. But again looking through the whole of the proceedings in that cause, it does appear to me that, substantially, the question was not only raised and decided below, but the opinion of the Judges of the Court of Session was affirmed by the judgment

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of this House. I find that, of necessity, the relative situation of the parties was stated in the summons; I find that this particular point was raised by the defender; I find that a considerable majority of the Judges, in delivering their opinions, alluded to this particular point, and expressed their opinion, that the contravention could not be enforced against the heir of the contravener. And then, looking to what passed in this House, I find that at one period *Lord Thurlow*, and that upon a subsequent discussion, *Lord Eldon*, in terms alluded to this question: *Lord Thurlow* saying, "it is a question whether it "be possible to qualify a forfeiture against Sir Hew for himself "and his children, after his own death;" and I find *Lord Eldon* saying, "the question is whether those persons who are "innocent parties, the heirs of taillie, can be excluded from a title "with reference to which they have done nothing to exclude "themselves, unless there be not only an act, but a judgment "of law to that effect." It is quite clear, therefore, that the question was raised; it is quite clear that the Judges of the Court of Session decided upon that point; and it is quite clear that the noble Lords who advised the House upon those two occasions on which it was discussed in this House, had that point distinctly in their minds. And then I find *Lord Eldon* saying, "every question arising on this point has been searched "to the bottom, and deliberately decided." *Lord Eldon*, therefore, who pointr to this as one of the questions, states that every question had been searched to the bottom and deliberately decided; and he advises the House to affirm the interlocutor in the way I am now about to state, which was ultimately done—"that the matters in the pursuers' summonses are not "sufficient to sustain the conclusions of those summonses."

Now, though the House might have been of opinion with the Judges of the Court below upon the other points, and though those other points might have been sufficient to lead them to sustain the judgment of the Court below, when we find

that the point had been raised, and deliberately discussed, and that the noble lords who presided in this House alluded to the point, and then came to the conclusion to affirm the interlocutor of the Court below, stating, "that the summonses did not "contain sufficient matter to sustain the conclusion of those "summonses," it is impossible to suppose that they thought the Court of Session wrong in the opinions they had expressed upon this particular point. Though the decision pronounced in that case does not therefore in express terms point to the question, yet, when we find the question argued and decided upon in the Court below, and all the grounds of the decision of the Court below sanctioned and affirmed by this House, it appears to me that that case must be considered as having decided the point; that we must adhere to that decision; and being of that opinion, it would be not only unnecessary, but improper, to consider the grounds upon which that decision was come to. I will, therefore, without entering into the details of those grounds, merely state, that if this point were now for the first time mooted, and the Bargany case had not been decided at all, and this House were called upon in the first instance, to pronounce an opinion upon the question which was discussed at the bar, I should be of opinion that the conclusion should be the same as the conclusion of this House in the Bargany case.

LORD CAMPBELL.—My Lords, I am likewise of opinion that in this case the interlocutor appealed from should be affirmed. I confess that I doubt whether the decision of this House in the Bargany case, is so completely a decision of the question upon which this appeal turns, as absolutely to bind us, and to shut out the discussion of the question. The point was undoubtedly raised in the first Bargany case, and the majority of the Judges in the Court below, expressed the opinion that the action could not be brought against the heir of the contravener; and that opinion is not at all dissented from by Lord

Eldon in the House of Lords, but it is not introduced as a *ratio decidendi;* and I do not find that Lord Eldon takes any express and specific notice of it—he uses language which would embrace the point—but I think he does not give any express opinion whether, if there be a contravention, an action may be brought against the heir of the contravener.

But, my Lords, as a mere authority, that case is entitled to the greatest weight, because you have a large majority of the Judges of the Court below, who express an opinion that the action must be brought against the contravener, and you have Lord Eldon countenancing that doctrine—although I cannot say that, according to my recollection of the case, he specifically adjudges it.

The great difficulty is, in understanding how, if this point had been decided specifically by the Court below, and by the House of Lords in the first Bargany case, the second Bargany case arose; and why that decision was not at once considered as an entire bar to any subsequent proceeding? But, my Lords, as Lord Thurlow and Lord Eldon have said, there seems to have been a fatality about that Bargany case, from its commencement to its termination; and there is much obscurity hanging over the views of the several judges by whom it was decided.

But, my Lords, I entertain no doubt at all that, independently of the Bargany case, this interlocutor ought to be affirmed. My Lords, I will not consider whether this is a penal action or not a penal action; this is really a matter *positivi juris*, and you must look to see how it has been treated by the law of Scotland. Now it seems to me that, independently of the Bargany case, it has been considered that an action of declarator, so as to take advantage of the forfeiture, must be brought against the contravener. For that purpose, the case of Gordon of Park seems to me to be an express authority, for there the contravention having been in the time

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of Sir William Gordon, and the Crown being placed in the situation of his heir, as if he had died naturally, and had been succeeded by his heir, it was held by the Court below, and it was held by this House, that the action could not be maintained to take advantage of that contravention, because the action had not been commenced against the contravener before the forfeiture. That seems to me, my Lords, to be an express authority, and upon that authority I rely; and I have no doubt at all that an action to take advantage of the forfeiture, must be brought against the contravener.

Then, my Lords, I find no authority on the other side; we were told,—I do not say that it was expressly asserted, but I understand both from the statement in the case, and from the manner in which that case was first cited at the bar,—that in the case of Denham, the action had been brought against the heir of the contravener; but when you examine that case, you find that the action was commenced against the contravener, and by a well-known process in the law of Scotland, it was continued against his heir—the same action being continued by what they call the process of wakening and transference.

Therefore, my Lords, the case of Gordon of Park stands on one side, (setting aside the Bargany case, which has been alluded to so much,) and in my humble opinion it is not met by any authority on the other side; and on that ground I have no doubt that in this case the Court came to a right decision, that the action could not be maintained.

It must be understood that this only settles the point that an action for a contravention, so as to work a forfeiture and to transfer the estate to the next substitute upon the *quibus deficientibus*, must be brought against the contravener. We say nothing whatsoever respecting an action of reduction, whereby the entail may be restored, and the intention of the settlor carried into effect. It has been said that this might give a facility to the docking of estates in tail in Scotland. To gain

this object effectually, the legislature must interfere, and we cannot resort to a devise as was done in England, in Taltarum's case; but if a decision resting on former authorities, and on the recognized principles of the law of Scotland, has such a tendency, I shall not regret the result.

It is ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors therein complained of, be and the same are hereby affirmed. And it is further ordered, That the appellants do pay, or cause to be paid to the said respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

LAW and ANTON—GRAHAME and WEEMS, Agents.

[21*st July*, 1846.]

ROBERT GRAHAM, late Gunner in the Royal Navy, *Appellant.*

WILLIAM G. WATT, of Breckness, *Respondent.*

*Prescription.*—Absence from the kingdom on service as a common sailor in the Royal Navy—the service commencing by impressment—is not sufficient *non valentia agere* to elide the long prescription of forty years, pleaded in defence to an action for reduction of a conveyance of lands.

THE appellant, in 1839, brought an action against the respondent for reduction of a disposition, dated in July 1787, bearing to have been granted by his father to the father of the respondent, of lands situated in Orkney, the place of residence of the parties, upon the ground that the disposition was not a habile mode of conveyance of the lands, which were of udal tenure, and that the signature to the disposition was forged, or, at all events, had been obtained through fraud and circumvention.

The respondent pleaded in defence to this action, that he and his father had possessed upon the disposition challenged, for upwards of forty years; that their title was fortified by the positive prescription of forty years, and the right of challenge cut off by the negative prescription.

The appellant answered, that about the year 1790, during the life of his father, when he was only sixteen years of age, and while he was returning as an apprentice on board a merchant vessel on a voyage from India, he had been impressed into the Royal Navy, and remained in the "Cyclops" frigate for twelve months, until she was wrecked on the coast of France. That he then shipped on board a merchant vessel, and while on the homeward voyage, he was re-impressed at the Isle of Wight into the "Leopard" frigate, in the year 1793, then

cruizing off the coasts of France and Spain. That he was shortly afterwards transferred to the "Bellona," 74, and taken to the West Indies. That about the year 1795 he deserted, in order to visit his native country, but was taken and placed on board the "Quebec" frigate, and having again deserted and joined a vessel bound for England, he was again taken, subjected to fine and imprisonment, and afterwards placed on board the "Veteran," 74, then on the West India station, in which he served for some time. That he also served on board the "Duke," 98, and afterwards the "Bellona," on the coasts of France and Spain, and in the Mediterranean. That from the "Bellona" he was transferred to the "Zealand," and served in her for some time on the coast of Holland. That about 1800 he was placed on board the "Arrow," as gunner, and from that time for about twelve years he was in constant service on various stations; in particular, from 1800 to 1804, on the coasts of France and Holland and the Mediterranean; from 1804 to 1806, on the Mediterranean station; from 1806 to 1808, at Gibraltar; from 1808 to 1810, on the East India station; from 1810 to 1813, on the coast of France and the Mediterranean. That though, at one time, off the coast of England, he was drafted to another ship, and, as gunner, could not obtain leave of absence. That he wrote to his friends, but received no answer, and from the time of his impressment till the year 1813, was wholly precluded from attending to his interest as affected by the deeds challenged, and in ignorance of his father's death, and of the circumstances in which the property in question was placed. That from the year 1813 till 1836 he served on home stations, when he was paid off, and went to Scotland, and then he commenced inquiries, and lost no time in bringing his action.

The issue clerks prepared three several issues for trial by jury. The first being as to forgery, the third as to fraud, and the second in these terms:—"Whether the pursuer, from the "year 1800 till the year 1812, was *non valens agere*, and was so

"prevented from bringing any challenge of the said deed;" but upon the issues being reported to the Court by the Lord Ordinary, the appellant abandoned the first issue, and the second and third were disallowed by the Court on the 14th July, 1843; and afterwards the respondent was assoilzied from the action by an interlocutor of the Lord Ordinary of 9th February, which was adhered to by the Court on the 6th of March, 1844. The appeal was taken against these different interlocutors.

On the hearing of the appeal, a lengthened argument was maintained by the respondent to show that *non valentia agere*, though a good answer to the negative prescription, was none to the positive prescription; and by the appellant, to show that a party could not plead the positive prescription, even to this effect, without being able also to plead the negative. But in the view the House took of the case, it is not necessary to notice these questions further.

*Mr. Anderson* and *Mr. R. Henderson* for the Appellant.—The period which elapsed between the date of the deed challenged and of this action, is, no doubt, sufficient to cut off the appellant's right of challenge, unless he can establish a sufficient ground for the plea of *non valens agere* to elide the negative prescription of forty years. This plea is not statutory or defined, but is a common law exception to the operation of the Act 1617. It has been admitted in cases of minority and marriage, but in none of the authorities is it limited to these two cases. On the contrary, it is treated as of an expansive nature, embracing every state of circumstances, creating in the party an actual incapacity or inability to sue. *Ersk.* iii. 7, 37; *Stair* ii. 12, 27; *Bell's Prin.* 2023. In the civil law, on which the law of Scotland is founded, and to which reference is made in the preamble of the Act 1617, *absentia reipublicæ causa* was admitted as an exception to the *prescriptio quadriennii*. *C. L.* ii. tit. 51. *McKenzie*, in his "Observations on the Statutes,"

says, "the exception allowed by the civil law, of *non valens agere*, is "allowable in our's, though it be not expressed in this Act;" and *Bell*, in the passage which has been referred to, speaks of *vis major* as an exception admitted.

Here the appellant did not enter the King's service voluntarily, and thereby create the incapacity which he sets up. He was forcibly impressed into it, and brought back and compelled to remain in it after three attempts to escape.

[*Lord Chancellor.*—On each of these occasions he made himself *sui juris*, but he does not say where he was retaken.]

At all events, it does not appear that he ever returned to Scotland. The forcible nature of the original impressment gave the service a character which attached to it throughout. The foundation of the negative prescription is an implied abandonment for forty years of the right at last insisted upon, but any circumstance sufficient to rebut that presumption will destroy its effect. The appellant, at the time he was impressed, was a minor; he continued in that condition until the year 1800; and after 1800, till 1813 at least, he was detained abroad. Letters from him to his friends were unanswered, so that he was ignorant of his father's death or the state of his rights; and the communication between Orkney and the mainland of Scotland was such, at that time, that if he had obtained leave of absence, he could not have used it, from the time that would have been consumed in going and returning. If these circumstances should be proved, it would be impossible to presume that the appellant had abandoned his right to challenge the deed in question, the nature and effect of which he was wholly ignorant of. And all that the appellant desired, by asking the issue which was disallowed, was an opportunity of proving these facts, and taking the opinion of a jury, whether they did not create an incapacity to sue.

*Mr. Bethel* for the Respondent.—Assuming *non valentia agere*

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to be an answer competent to be made to the positive prescription, the facts which the appellant has himself stated are not such as, if proved, would constitute *non valentia*. The position he takes amounts in substance to this, that every person, from the Field Marshal to the drummer downwards, if engaged abroad on military service, is exempt from the currency of the long prescription, positive as well as negative; a proposition sufficiently startling, as it would in effect do away with the law of prescription in a host of cases, and one, therefore, which the House will not accede to without authority for its adoption; but no authority in its favour is produced.

*Absentia reipublicæ causa*, whatever may have been the effect of it in the earlier period of the civil law, was not allowed by that law, as consolidated by *Justinian*, to be any answer to the *prescriptio longissimi temporis*. But were this otherwise, it is no where defined what is the *absentia reipublicæ causa* which will be good for this purpose. No authority makes military service a sufficient excuse, nor is there anything in the nature of the service which should render it such. It may prevent the party's bodily presence to attend to his interests, but it does not prevent his communicating with those who could do so for him in his absence. Sickness occurring just on the expiry of the prescriptive period, though a very evident *non valentia*, would not elide prescription, still less can mere absence. If they were, the very object of the prescription—the quieting of men's minds in the possession of their property—would be defeated. Instead of forty years being the limit, questions of title might be raised at any period, however distant, if excuses, such as that set up by the appellant, were admissible. But while the appellant does not produce any authority for the position he asserts, there is express authority against it in Whitefoord *v.* Kilmarnock, *Mor.* 11198. There, Whitefoord, in answer to the negative prescription, pleaded that he was *non valens agere*, because, from 1638 to 1649, he was on military

service in England, and from 1649 to 1660 he was banished from Scotland as an adherent of the royal cause. The Court admitted the answer for the last of these periods, but repelled it for the first period, "because he might have assigned or pur-"sued, notwithstanding his being in the king's army." So here the appellant might have assigned or pursued, though he was in the king's navy; there was nothing in the one case more than the other. A distinction was attempted, upon the circumstance that the party had been originally impressed into the service; but that was without any foundation, for there was no distinction, so far as regarded communication with their friends or advisers, between the man who had been impressed and the man who had freely entered into the service.

*Mr. Anderson* in reply.—The statute is founded on a recital of the civil law, which held that one *absens sine dolo malo reipublicæ causa* was not open to prescription. When it is asked who is absent *reipublicæ causa*, the answer is obvious, *qui quia reipublicæ causa abesse est*—

[*Lord Campbell.*—What is the general proposition you contend for?]

That absence beyond seas on public service is an answer to the negative prescription.

[*Lord Chancellor.*—Will absence to Ireland, or Jersey, or Guernsey, be sufficient?]

It is impossible to fix a line—every case must depend on its own circumstances.

[*Lord Campbell.*—You must show, by some authority, that that is the law of Scotland. If the absence has been for various fractions of time, are these to be added together and be deducted?]

There is no inflexible rule; the question is always one of circumstances. The rule of the civil law has been adopted, both as to infancy and coverture; and military service is

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equally within the rule. With regard to Whitefoord v. Kilmarnock, the party there was within the kingdom, though out of Scotland, during the service, and the period of banishment being deducted, prescription was thereby elided, and he ceased to have any interest to insist upon the period of service.

LORD CHANCELLOR.—In this case, the defender having set up a title of forty years' prescription, the question before the Court below was, whether, under the facts stated, there was sufficient in the history of the pursuer to explain the reason why he had not asserted his title, and why the forty years' prescription should not run.

My Lords, a distinction has been taken in the argument, between the positive and the negative prescription, and difficulties have been suggested as to the mode in which those two rules ought to be applied. If the Court of Session were right in the view that they took of this case, that the facts did not entitle the party to be exempted from the operation of the forty years' prescription, either positive or negative, that distinction becomes perfectly immaterial; and I, being of opinion that the Court of Session were right in the view that they took of the facts stated upon that point, do not think it necessary to express any opinion upon the argument urged at the bar. The question is, whether the facts which are stated by the pursuer himself are sufficient, according to the rule established in Scotland, to prevent the operation of the forty years' prescription.

Now the facts are, that the party was impressed into the royal navy during his minority; in that state he visited different parts of the world, and continued serving in the royal navy during the remainder of the forty years; and the question is, whether those circumstances are sufficient to prevent the forty years from running.

In favour of the argument that the forty years do not run against a person under those circumstances, no authority what-

ever has been quoted. If such an instance had existed, I am quite sure, from the industry and knowledge of the learned counsel for the appellant, our attention would have been drawn to the case in which that point had been established. But there is an early case which seems to have been followed ever since, and which we are entitled to assume has been followed ever since, from the fact of there being no authority of a subsequent date impeaching it, namely, Whitefoord's case, in which that very point was raised. There, according to the statement which appears to be correct, in the appellant's case, (I am quoting from page 14,) "Colonel Whitefoord charged Lord " Kilmarnock for payment of the teinds of certain lands, to " which, in defence, he urged that he held a prescriptive right. " The charger answered, *contra non valentem agere non currit præ-* " *scriptio*, and stated that he had been engaged as a soldier in the " king's service in 1638, and served the king in the wars during " the troubles till 1649; that he was taken with Montrose, and " ran the hazard of being executed, but with great difficulty was " saved, and only banished the kingdom, on finding caution not " to return under pain of 5000*l.* Accordingly he went out of the " country, and did not return until the Restoration in 1660. The " judgment on the principal point was to this effect:—The Lords " found the colonel was *non valens agere*, in respect of his banish- " ment, and therefore repelled the defence of prescription; but the " other point came to be argued, as to the time the colonel was " absent from Scotland on service *in England*. The pursuer con- " tended that the interruption must be sustained in his favour " from 1638, seeing he was in the king's army in England, and " so *absens reipublicæ causa*, which the Lords repelled, because " he might have assigned or pursued, notwithstanding he was " in the king's army."

Now, my Lords, there cannot be a more distinct and positive decision than this. The point was keenly raised, and distinctly

decided by the Court, and from that time to the present, as far as appears from any authority which has been brought before us, that has been considered as good law, and has been acted upon and adopted as the rule in Scotland. It is very true that a more extended rule applies in the civil law, and that the Scotch law is in a great measure taken from the civil law; but the case is not less an authority in Scotland because it is not founded on the civil law, which the law of Scotland has adopted to a certain extent. The law of Scotland has laid down rules and limitations to what extent that law is to be applicable in Scotland. In the present case it has prescribed the limits within which the rule is to be adopted; it has adopted it as far as banishment is concerned. Here the excuse is merely absence in the royal service; this case cannot be put higher than that.

As to any distinction about the sea, or whether the absence or distance from Scotland is over the sea or over the border, that can make no difference. The ground is absence from the country in which the title exists.

Now, we have a positive decision upon the subject, which does not appear to be interfered with by any subsequent decision; and therefore I advise your Lordships to adhere to the rule so laid down, which is not far from 200 years old, and not to disturb the rule which has been incorporated in, and adopted by the law of Scotland.

LORD CAMPBELL.—My Lords, I am entirely of the same opinion. I think that we are not in this case called upon to give any opinion with respect to the distinction between the negative and positive prescription, because it appears to me upon the facts that are alleged in this case by the pursuer, that he does not show that the plea of prescription should not prevail.

I think that the Court of Session were quite right in refusing the issue. The issue in its terms seems to me to be

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quite preposterous—"Whether the pursuer from the year 1800 "till the year 1812, was *non valens agere*, and was so prevented "from bringing any challenge of the said deed."

I must express my great surprise that any lawyer should propose to send such an issue for the determination of a jury; because it would resolve itself into a question of law much more than a question of fact. But still, if, upon the allegations there were a disputed fact which might be material for the consideration of a jury, we might frame another issue, and direct that issue to be tried; but it seems to me, my Lords, that, looking to all the facts that are alleged by the pursuer, and giving credit to everything that he alleges, he offers no answer to the plea of prescription.

Now, as has been stated by my noble and learned friend the Lord Chancellor, giving the fullest credit to all that the pursuer says, the effect of it is this, that he was abroad in the service of his country, serving in the royal navy for a sufficient period of time to reduce the period below the forty years. Well, then, there must be some rule laid down upon which that should be considered as an answer to the plea of prescription, because it is utterly impossible to look to the circumstances of each particular case. There would be no safety to titles, no security to mankind, if there were not a general rule upon this subject. It is said there is a hardship upon the claimant; but consider the hardship that there is to the party against whom the claim is brought; the documents are destroyed, the witnesses die; a title that might be proved, if it were recently disputed, cannot afterwards very possibly be supported. Look at this very case:—It is alleged that the signature of the pursuer's father was forged, and that the pursuer's father was in a state of imbecility, and was not competent to execute a deed; and these facts are to be inquired into half a century after the period when the deed was executed! The witnesses and the documents that would clearly have established the validity of the transaction,

may now have vanished; it is of the last possible importance, therefore, that a rule of prescription should be laid down, and that that should be adhered to, subject to certain defined exceptions.

Coverture and infancy are well-known exceptions; but it lies upon the pursuer to show that what he relies upon is likewise an exception. Where is the authority for saying that the fact of a party being absent in the public service, suspends the operation of prescription. It certainly would be a very inconvenient rule, because, if prescription is suspended once, it may be suspended again and again. You can make no distinction between a gunner and a commander-in-chief of an army; you can make no distinction between a military officer and an ambassador. At the distance of a century, or of nearly a century, when the plea of prescription was pleaded, it might be answered:—"Yes; but seventy years before, or fifty years "before, or forty years before, for two or three years, the in- "dividual was serving his country in the army, or was repre- "senting his sovereign at a foreign court." It would require very strong authority to prove that a rule that is so inconvenient, has been adopted by the law of Scotland. Now, there is no authority to show that such a rule has been adopted; but there is this positive case of Whitefoord to show that it has been rejected. It is not the law of Scotland, it never has been acted upon; and, when it was contended to be the law of Scotland, that argument wholly failed.

I therefore think that the Court of Session was perfectly justified in overruling this plea, and saying that no answer whatever had been given to the plea of prescription.

It is ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be, and the same are hereby affirmed. And it is further ordered, That the appellant do pay, or cause to be

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paid, to the said respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DUNN and DOBIE—DEANS, DUNLOP, and HOPE, Agents.

[HEARD 14*th July*—JUDGMENT 23*rd July*, 1846.]

The NORTH BRITISH RAILWAY COMPANY, *Appellants.*

JOHN TOD, ESQ., of Kirkhill, *Respondent.*

*Statutes.—Local Railway Acts.*—In construing the powers given by a local statute, plans exhibited, or notices given, prior to the passing of the statute, are to be disregarded, except in so far as they may have been incorporated into or made part of the Act. Terms of clause held not to amount to such incorporation.

*Ibid.*—In construing local Acts, with reference to plans deposited under the Standing Orders of either House of Parliament, these orders must be put wholly out of the question.

*Railway Act, 8th and 9th Victoria, cap.* 33.—If a proposed deviation of the level of a railway be within five feet of the original level, calculated with reference to the *datum* line in the plans deposited under the Standing Orders of either House of Parliament, the deviation will be within the power of deviation allowed by this statute, although it should exceed five feet calculated with reference to the *surface*-level shown upon the plans.

IN the month of December 1844, the appellants, in compliance with the Standing Orders of the House of Lords, served a notice upon the respondent, that an application would be made by them in the ensuing session of Parliament for power to make a railway from the Edinburgh and Dalkeith Railway to the town of Hawick, and that the property mentioned in the schedule annexed to the notice, being the property of the respondent, would be required for the railway, "according to "the line thereof as at present laid out, or under the usual "powers of deviation to the extent of 100 yards on either side "of the line, and will be passed through in manner mentioned "in such schedule;" and that a plan and section of the rail-

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way had been deposited with the parish authorities. In the schedule annexed to this notice, and in a column of it, entitled, "Description of the section of the line deposited, and of the "greatest height of embankment and depth of cutting," were inserted these words, "Cutting, 15 feet 4 inches. Bridge."

This notice was given in compliance with the Standing Order, in these terms: "That, on or before the 31st day of "December, immediately preceding the application for a bill, "by which any lands or houses are intended to be taken, or an "extension of the time granted by any former Act for that pur- "pose is sought for, application in writing, (and in cases of bills "included in the second class, in the form, as near as may be, "set forth in the Appendix marked A.,) be made to the owners "or reputed owners, lessees or reputed lessees, and occupiers, "either by delivering the same personally, or by leaving the "same at their usual place of abode, or, in their absence from "the United Kingdom, with their agents respectively, of which "application the production of a written acknowledgment by "the party applied to shall, in the absence of other proof, be "sufficient evidence; and that separate lists be made of such "owners, lessees, and occupiers, distinguishing which of them "have assented, dissented, or are neuter in respect thereto."

And the plan and section referred to in the notice were deposited in compliance with two other Standing Orders, Nos. 223–3 and 223–5, in these terms: "223–3. That a plan, and also a "duplicate of such plan, on a scale of not less than 4 inches "to a mile, be deposited for public inspection at the office of "the clerk of the peace for every county, riding, or division, in "England or Ireland, or in the office of the principal sheriff- "clerk of every county in Scotland, in or through which the "work is proposed to be made, maintained, varied, extended, "or enlarged, on or before the 30th day of November immedi- "ately preceding the session of Parliament in which applica- "tion for the bill shall be made; which plans shall describe

" the line or situation of the whole of the work, and the lands " in or through which it is to be made, maintained, varied, " extended, or enlarged, or through which every communica- " tion to or from the work shall be made, together with a book " of reference, containing the names of the owners or reputed " owners, lessees or reputed lessees, and occupiers, of such " lands respectively; and in the case of bills relating to turn- " pike roads, cuts, canals, reservoirs, aqueducts, and railways, " a section and duplicate thereof, as hereinafter described, shall " likewise be deposited with each plan and duplicate."

" 223–5. That the section shall be drawn to the same hori- " zontal scale as the plan, and to a vertical scale of not less " than 1 inch to every 100 feet, and shall show the surface of " the ground marked on the plan, and the intended level of " the proposed work, and a datum horizontal line, which shall " be the same throughout the whole length of the work, or any " branch thereof respectively, and shall be referred to some " fixed point, (stated in writing on the section,) near either of " the termini."

By the plan deposited with the parish authorities, it appeared that the railway would cross the approach to the respondent's house about 520 feet from the lodge at his gate on the turnpike road between the house and the lodge; that it would do so in a cutting of 15 feet 4 inches deep from the level of the ground at that particular point; and that the approach to the respondent's house would be carried over the railway by a bridge which would raise its level two feet. By the corresponding section, also deposited with the authorities, it appeared that the approach to the respondent's house would have an inclination of one foot in twenty for a short distance from the summit level of the bridge over the railway.

As the house of the respondent was situated at a surface level considerably lower than that of the point at which the plan represented the railway would cut his approach, the proposed

works of the appellants did not seem to him calculated to occasion anything offensive or obstructive to the view from his house, and in consequence he did not offer any opposition in Parliament to the bill proposed to be obtained by the appellants.

The appellants obtained their proposed Act, which, by its 1st section, declared, that "The Lands' Clauses Consolidation Act "(Scotland), 1845, and the Railway Clauses Consolidation Act, "1845, shall be incorporated with, and form part of, this Act, "save as to any provisions thereof respectively which may be "modified by, or be inconsistent with, the provisions of this "Act."

The only clauses of the Railway Clauses Consolidation Act, declared to be incorporated with the appellants' Act, which it is necessary to notice, are the 11th and 15th.

The 11th section of that Act was in these terms: "In "making the railway, it shall not be lawful for the company to "deviate from the levels of the railway, as referred to the com- "mon datum line described in the section approved of by Par- "liament, and as marked on the same, to any extent exceeding "in any place 5 feet; or, in passing through a town, village, "street, or land continuously built upon, 2 feet, without the "previous consent in writing, of the owners and occupiers of "the land in which such deviation is intended to be made; or, "in case any street or public highway shall be affected by such "deviation, then the same shall not be made without the con- "sent of the trustees or commissioners having the control of "such street or public highway, or, if there be no such trustees "or commissioners, without the consent of the sheriff, or with- "out the consent of the trustees or commissioners for any "public sewers, or the proprietors of any canal, navigation, gas- "works, or water-works, affected by such deviation: Provided "always, That it shall be lawful for the company to deviate "from the said levels to a further extent without such consent

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" as aforesaid, by lowering solid embankments or viaducts, pro-
" vided that the requisite height of headway, as prescribed by
" Act of Parliament, be left for roads, streets, or canals passing
" under the same: provided also, that notice of every applica-
" tion to the sheriff, for the purpose of considering the matter,
" shall, fourteen days previous to such application, be given in
" some newspaper circulating in the county, and also be affixed
" upon the door of the parish church, in which such deviation or
" alteration is intended to be made; or, if there be no church,
" some other place to which notices are usually affixed."

And the 15th section: " It shall be lawful for the company
" to deviate from the line delineated on the plans so deposited,
" provided that no such deviation shall extend to a greater
" distance than the limits of deviation delineated upon the said
" plans, nor to a greater extent, in passing through a town, than
" 10 yards, or elsewhere to a greater extent than 100 yards from
" the said line, and that the railway, by means of such deviation,
" be not made to extend into the lands of any person, whether
" owner, lessee, or occupier, whose name is not mentioned in
" the books of reference, without the previous consent, in writ-
" ing, of such person, unless the name of such person shall have
" been omitted by mistake, and the fact that such omission pro-
" ceeded from mistake shall have been certified in manner herein
" or in the special Act provided for in cases of unintentional
" errors in the said book of reference."

The sixteenth section of the Act obtained by the appellants was in these terms: " And whereas plans and sections of the
" railway, showing the line and levels thereof, and also books
" of reference, containing the names of the owners, lessees, and
" occupiers, or reputed owners, and lessees, and occupiers of the
" lands through which the same is intended to pass, have been
" deposited with the sheriff-clerks of the counties of Edinburgh,
" Selkirk, and Roxburgh: Be it Enacted, That, subject to the
" provisions in this and the said recited Acts contained, it shall

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" be lawful for the said company to make and maintain the said " railway and works, in the line, and upon the lands, delineated " on the said plans, and described in the said books of reference, " and to enter upon, take, and use such of the said lands as shall " be necessary for such purpose."

The appellants obtained their Act in the month of July, 1845. In December following they served a notice and a relative plan upon the respondent, showing that they intended to make a deviation of the railway at its intersection with the approach to his house, by making the line 66 feet nearer his house, in a cutting 2 feet 10 inches deep, and that they intended carrying his carriage-road over the line by a bridge about 17 feet above the existing level of the ground, with a corresponding descent on either side.

Upon receiving this notice, the respondent presented a note of suspension and interdict to the Court of Session, which, as subsequently altered with the leave of the Court, prayed the Court to interdict the appellants " from constructing or carrying " the said railway through the said approach or avenue to the " complainer's house, except at a depth of 15 feet 4 inches from " the present surface-level of the said avenue, at the point of " original intersection, and under a bridge not higher than 2 feet " from the said point to the metalled surface of the roadway " along such bridge, with a gradient or descent of not more " than 1 in every 20 feet, from the summit-level of the roadway on " said bridge towards Kirkhill House; or, in the event of the " said company exercising their powers of deviation, at a depth " not less than 10 feet 4 inches below the level of the said " point, and under a bridge not higher than seven feet from the " level of the said point to the metalled surface of the roadway " along said bridge, with a gradient or descent of like inclina- " tion, from the summit-level of the roadway on the bridge " towards Kirkhill House; and thereafter, on the discussion of " the suspension and interdict, to declare the interdict per-

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" petual; or to do otherwise in the premises, as to your lord-" ships shall seem proper."

The Lord Ordinary, (*Robertson*,) remitted to an engineer to report, whether the plan served upon the respondent was within the line of deviation as delineated in the parliamentary plan; 2nd, whether it differed from that plan, and in what particulars; 3rd, whether the plan of the proposed works deviated from the levels of the railway, as referred to the common datum line described in the section approved of by Parliament, and as marked on the same to any extent, and if so, to what extent.

The report of the engineer disclosed this state of matters. As the *surface*-level of the ground, at the point of intersection of the respondent's road to which the appellants proposed to remove their line, was much lower than the surface-level of the ground at the point of intersection originally projected, the necessary consequence of the deviation would be to make the railway cross the respondent's road nearer to the surface of the ground; and upon the assumption that the levels in the parliamentary plan and section of the *surface*, and of the *railway* with reference both to the surface and to the datum line, were correctly stated, and that the level of the railway, with reference to the datum line, had not been raised in the plan of the proposed deviation, the depth of the cutting at the new point of intersection should be 13 feet 5 inches; the difference between the *surface*-level at the original point of intersection, and at the new point of intersection, being only 1 foot 11 inches; whereas it was shown on the plan of the deviation, that the cutting at the new point of intersection would be only 2 feet 10 inches deep, which left 10 feet 7 inches of the 13 feet 5 inches to be accounted for on the only possible supposition that the level of the railway itself, as referred to the datum line, must have been raised to that extent. But upon taking the actual levels, it appeared that although the cutting at the new point of intersection would be only 2 feet 10 inches deep, the level of the

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railway would deviate from the levels in the parliamentary plan, as referred to the *datum* line, only 3 feet 2 inches. The necessary inference, therefore, as stated by the engineer, was, that the parliamentary plan had given an erroneous level of the *surface* of the ground at the point of intersection originally proposed, and that this error was to the extent of the 10 feet 7 inches which have been noticed as unaccounted for.

It thus appeared that the proposed deviation, according to the *actual* levels as referred to the *datum* line, was *laterally* 66 feet, being 34 feet within the 100 feet of lateral deviation allowed by the Railway Clauses Consolidation Act, and *vertically*, as referred to the datum line, 3 feet 2 inches, being 1 foot 10 inches within the five feet of vertical deviation allowed by the same statute. But that while this was the case, if the level of the *surface*, as represented upon the parliamentary plan and section, had been correct, the respondent had a right to expect that the cutting for the railway at the new point of intersection, calculated with reference to that surface-level, should be 8 feet 5 inches, if the level of the railway was raised 5 feet, the sum of vertical deviation allowed by the public Act, or 10 feet 3 inches, if that level were raised only 3 feet 2 inches, the amount to which the engineer represented it would actually be raised by the proposed plan of deviation; whereas, according to that plan, the depth of the cutting would actually be only 2 feet 10 inches, as already stated.

The Court, on the 11th March, 1846, passed the note of suspension, and granted interdict in the terms prayed by it.

The appeal was against this interlocutor.

*Mr. Stuart* and *Mr. Bethel* for the Appellants.—All that the private Act obtained by the appellants requires, is that the railway be "in the line and upon the lands" delineated upon the parliamentary plan. These words are to be construed with reference to the Railway Clauses Consolidation Act, which

is declared to be part of the appellants' Act. By that statute a deviation of the line from that delineated on the plan, is allowed to the extent of 100 yards laterally, and 5 feet vertically. It is admitted that the deviation proposed by the appellants, is within the *lateral* limit, and no question is or can be raised upon that point; but it is said the deviation proposed is not within the *vertical* limit, because the 16th section of the appellants' Act recites, that plans and sections, "showing the line "and *levels*" of the railway had been deposited; and, therefore, it is said, the levels upon that plan must regulate the appellants' operations, and if that were done, and if the level of the railway with reference to the level of the surface of the ground, as shown upon that plan, were observed, the railway would cross the respondent's road at a greater depth from that surface than is proposed.—The answer to that is threefold.

1st. The plans and sections deposited with the authorities prior to the introduction of the respondent's bill into Parliament, were so deposited in compliance with the Standing Orders of this House. These orders, in requiring the deposit, have a view solely to the protection and convenience of the public, by giving them early intimation of what is about to be asked of Parliament; but they neither are intended to have, nor could they, without the authority of the other branches of the legislature, by possibility have, any effect in themselves upon the enactments of any statute involving the matter contained in them. The only way in which these plans and sections could affect the construction of the statute, would be by the statute having in terms adopted them. If it be silent in regard to them, they cannot enter into the question. This would be conclusive upon the ordinary principles of legislation and statutory construction, but any consideration of them is excluded upon another ground. The acts obtained by private bodies, such as the appellants, for the execution of any given project, are contracts between them and the public. That has been repeat-

edly held in the Courts of this country, Blaikmore *v.* Glamorganshire Canal, 1 *My. & K.* 162; and upon the rules of construction applicable to these parliamentary contracts, as to all contracts, whatever may have been done prior to the execution of the contract, is to be excluded from consideration in ascertaining the construction of the contract, unless it is to be found within the four corners of the contract itself.

II. The Act under which the appellants' operations are authorized, no way adopts by reference or otherwise, the levels in the parliamentary plans and sections. The 16th clause, in its preamble, undoubtedly refers to these plans and sections, as showing the line and levels; but the reference to the *levels* is dropped in the enacting part of the clause; there the terms are confined to "the line and the lands," and in no other part are the levels in the parliamentary plan and section referred to. But,

III. While the private Act of the respondent is silent in itself as to the level according to which the railway is to be constructed, the general and public Railway Clauses Consolidation Act, which is incorporated into and forms part of the private Act, speaks expressly upon the subject. It refers to the levels in the parliamentary plan and section, by declaring, that it shall not be lawful to deviate the levels of the railway, "*as referred to the common datum line*" described in the parliamentary section, more than five feet; but it is altogether silent in regard to the levels of the railway, as referred to the surface level of the ground. It is obvious, therefore, that the legislature intentionally dropped in the private Act, mention of the levels according to which the line was to be constructed, because that was already provided for by the clause of the general Act which has just been referred to; not only so, but it evidently was the intention of the legislature, that this course should be followed in the framing of every private Act. Were it otherwise, the very object of the general Act, which was to lay down

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a general rule for every case, and supersede the necessity for legislation in each instance, would be defeated; moreover, the *datum* line in any given plan, is of necessity unchangeable throughout; whereas the *surface* line is continually changing. If, therefore, the private Act legislate as to the levels, and require, as the respondent says, the one now in question does, that the line be formed upon a level, having reference to the *surface* line, while the general Act requires the formation in every instance to be according to a level, having reference to the *datum* line, it is obvious that the construction of the two statutes together, would be altogether impracticable. It would require a very strong case indeed, to induce the House to adopt a construction of the private Act, which should so stultify the legislature. There is nothing, however, in the present instance, to call for such a construction, except the reference in the recital of the 16th clause, which, whatever doubt it may raise as to the object of that recital, is plainly insufficient for the purpose for which it is used.

The appellants' contention, therefore, is, that the express enactment of the general Act, and not doubtful inference from the recital in the private Act, must regulate the question between the parties. By the general Act, the appellants are allowed to make a deviation of the level as referred to the *datum* line described in the parliamentary section, so long as the deviation does not exceed five feet. By the report of the engineer, it has been shown, that the proposed deviation does not exceed three feet two inches; whereas the interlocutor of the Court below requires them to pass respondent's road, at a level which will make the deviation exceed the five feet considerably, and render it utterly impossible for the line to resume the level in passing through the adjoining lands on either side, which is required by the statute.

IV. It may be very true that the error in the parliamentary plan and section, in regard to the *surface* level, misled the respon-

dent; but, at the same time, he knew that a power of deviation would be taken, and that that power, if exercised, might necessarily occasion a vertical deviation. Admitting, therefore, that if the appellants had adhered to their original point of intersection, they would have been obliged to do so in a cutting of fifteen feet four inches, because of the representation in the parliamentary plan and section, making this part of the contract between them, it would not follow that at another point of intersection the same depth must be observed, because the power of lateral deviation was equally a part of the contract, and this, if exercised, would necessarily create a vertical deviation greater or lesser, even referring the line to the surface level. There was nothing in the parliamentary plan and section—even allowing them to form part of the contract—which made the appellants undertake that at whatever point within 100 yards of lateral deviation, they might cross the respondent's road, they would do so in a cutting of 15 feet 4 inches; the utmost that can be said even in that view, is, that they undertook to do so at the particular point indicated upon the plan. And excluding the plan and section from the contract, there is nothing in the conduct or representations of the appellants, which should vary their legal rights under the contract.

*Mr. Kelly* and *Mr. Rolt* for the Respondent.—I. Although the Standing Orders of this House, under which the parliamentary plan and section are deposited, have no legislative effect in themselves, this cannot be said of the plan and section. The legislature has by the 7 Will. IV., and 1 Vict. cap. 83, recognised them and the purpose for which they are required. The Railway Clauses Consolidation Act has adopted them as the rule of operations in each instance, and so has the local Act of the appellants, in the preamble of the sixteenth clause. The plan and section being thus adopted, the Standing Orders are of the utmost value in ascertaining their meaning and object; and it is

only for this purpose that reference is made to them, and to the notice served upon the respondent.

The Standing Orders are framed with a view to giving notice to the public, of how individual rights are proposed to be affected; and for this purpose the order 223–5 requires, that the plan deposited in compliance with order 223–3, shall show "the "surface of the ground marked on the plan; and the intended "level of the proposed work, and a datum horizontal line." The surface level, therefore, could no more be dispensed with in the plan, than could the datum line, and the exhibition of the one was no more a superfluity than was the exhibition of the other. Of the two, indeed, the surface level was of infinitely more importance to the public, than the datum line. All that the public had any interest in was, to see how the surface of each individual's land would be affected by the projected operations; once satisfied upon this subject, the datum line, although valuable as an unvarying and infallible check upon the projectors, is of comparatively little interest to the landholder, until a difference between the actual operations and those represented upon the plan, suggest to him the necessity of referring to this check. It is only for the purpose of such a check, that the datum line can have been required; for it cannot be supposed that anything so unreasonable would have been entertained, as that every landholder on the line of a projected railway, must be at the trouble and expense of having the level of the railway, with reference to the datum line, calculated and ascertained at the risk, if he fail to do so, of serious damage to his property; although from the representation given of the level of the railway with reference to the surface of his lands, he may not see any cause for apprehension.

[*Lord Cottenham.*—The Standing Orders cannot be referred to for the purpose of construction, though they may be of importance to show the dealing between the parties. The plans may be referred to, because they are referred to in the statute.]

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II. When the sixteenth clause of the appellants' Act recites that plans and sections of the railway, "showing the line and "levels thereof," had been deposited, as introductory to enacting that the railway might be formed, the only meaning which can with any reason be attached to such a recital, is, that the line is to be formed according to that line and to these levels; and by the use of the word "level" in the plural, the level with reference to the surface, as well the level with reference to the datum line, must have been embraced, for the Act does not point to the one more than the other as being shown on the plan, or being required to be shown, and both were shown upon it; and there were no other levels to which the use of that word in the clause in the plural could have reference. It is no doubt true, that in the enacting part of the clause, the word "levels" is dropped, but the words "and upon the lands," are introduced; so that it is not a repetition of the recital, dropping the word "levels," but a new independent sentence, in which it is obvious that the word "line" is used in a different and more general sense than in the recital, to express the line of the railway, both laterally and vertically; at all events, the clause is here silent as to levels, and refers to the plan upon which both the levels appear. The Act can as little, therefore, be said to dispense with the one level as with the other.

III. The general Act, in its eleventh section, makes it unlawful to deviate from the levels of the railway "as referred to the "common datum line described in the section approved of by "Parliament, and as marked on the same." The grammatical construction will not admit of reading these words, as if the levels meant were those referred to the datum line described on the section, and marked upon the section; neither will the state of the fact, for there are no levels marked upon the datum line. The words are not "as referred to and marked," but "*as* referred to and *as* marked." The levels in question, therefore, must be not only those referred to the datum line, but those

marked upon the section, and these will include the level with reference to the surface, as well as the level with reference to the datum line.

If the plan and section had been correctly drawn, this reading of the general Act could not lead to any difficulty or inconvenience, as suggested by the appellants. If the two levels had been correctly represented, a deviation from the one would necessarily infer a corresponding deviation from the other, to be corrected only by the variation of the surface; and inasmuch as the difference between the surface level at the original point of intersection, and the surface level at the new point of intersection, is only 1 foot 11 inches, that, deducted from 15 feet 4 inches, the depth of the original cutting from the surface, would leave 13 feet 5 inches as the depth of the new cutting; and allowing the 5 feet of vertical deviation permitted by the general Act, the cutting would still be at least 8 feet 5 inches. It is only by rejecting the plan and section as part of the Act, and of the contract between the parties, and taking the levels as they actually exist, instead of as they are referred to and marked upon the section, that the appellants can be enabled to do as they propose; but that is a course which has been refused in more cases than one, and upon the very ground that the plan and section are the rule by which to ascertain whether the Act has been complied with. Shand *v.* Henderson, 2 *Dow.* 519.

Even if it were impossible to read the private Act along with the general Act, so as to make them work consistently, the House will not strain the construction of the one, to make it accommodate to the other, where doing so will work an injury to the interest of the respondent, but will leave them to have the doubt resolved by the legislature. Webb *v.* Manchester and Leeds Railway Company, 4 *My. & Cr.* 120. Stowbridge Canal Company *v.* Wheeley, 2 *Bar. & Ad.* 793.

IV. Admitting that the appellants were entitled to have the construction put upon the statute which they contend for, and

that they have the legal right they insist upon, the Court below and this House have jurisdiction to restrain them from the exercise of this legal right, because of their conduct in the manner in which they obtained the right. The notice given by the appellants was worse than if they had given none at all. They intimated that the property of the respondent would be affected in a particular manner, which on inquiry, turns out to be erroneous. Had they not given any notice, the party could have inquired for himself. The effect of their notice, therefore, was to mislead, not to inform. And it cannot be said, that the respondent was bound to read the notice given to him qualified by the provisions of the general Act, for at the time he received the notice, the general Act had not been passed.

*Mr. Stuart* in reply. Though the Standing Orders required the depth of the cutting, with reference to the surface, to be stated, that was done away by the terms of the general and the private Act, which can alone be looked to for the present purpose; and the reason why it was done away with, was the great risk of inaccuracy from the constant variation in the surface level, whereas the datum line is necessarily invariable. This construction is not obstructed by the use of the word "*levels*" in the plural, for that is used not with reference to the levels at the point of intersection with the respondent's property, but with reference to the levels throughout the course of the railway, which must necessarily be different, one from the other, whether having regard to the datum line or to the surface level.

LORD CHANCELLOR.—My Lords, this is obviously a question of very great importance, as affecting the rights of the parties in the case.

My Lords, the first question to be considered is, what is the rule in respect to applications for interdicts in Scotland, or for injunctions in England, as applicable to cases of this

kind; the case upon the part of the pursuer being, that a plan was exhibited to him and to the public, previous to the Act passing, under which the railway in question was intended to be made, which represented that the railway would pass over his land in a cutting of something more than 15 feet from the surface. The respondent alleges, that, giving faith to these representations, he had, as he naturally might, come to the conclusion as to what course he was to pursue with reference to the supposed state of circumstances as represented upon that plan; and that now, the railway company have not only deviated laterally, which they had a right to do by another line within the prescribed distance, which is a hundred yards, but they also propose to deviate beyond five feet vertically, which is the limit of the vertical deviation imposed by the Act of Parliament; that they propose to come nearer the surface by a space exceeding the five feet. The railway company say, that they do not dispute that they are actually coming nearer the surface to a much greater extent than the five feet, but they say they are still within the prescribed deviation from the datum line as laid down for the formation of the railway, the datum line being an imaginary line taking its commencement from some given point at a certain elevation, and then that line is supposed to run in a perfectly horizontal direction, and the inclination of the railway is measured with reference to that datum line. They say they are within the distance, that is, within the five feet of the line laid down upon those plans measured with reference to the datum line; and they contend, therefore, that they are within the provisions of the Act of Parliament, and that they are not deviating beyond what that Act authorizes.

Now, my Lords, as to the effect of plans exhibited previous to the contract made, or previous to the Act of Parliament being obtained, it does seem from cases which have occurred both in Scotland and in this country, that the rule of the Courts in the one country and in the other, is no longer a matter of any doubt

or dispute. If a contract or an Act of Parliament refers to a plan, to the extent that the Act refers to the plan, and for the purpose for which the Act or contract refers to the plan, undoubtedly it is part of the contract or part of the Act. About that there is no dispute. A contract or an Act of Parliament either does not refer to a plan at all, or it does refer to it for a particular purpose. It has been contended, both in Scotland and in England, that the defendants in the suit, or those who claim the benefit of the provisions of the Act of Parliament previous to the enactment being made, or the contract being concluded, had represented that the works were to be carried on in a particular mode, upon a plan shown previous to the powers being obtained under the Act, or the contract being concluded; and that the party obtaining the Act, or obtaining the contract, is bound by such representation.

My Lords, there was a case very much considered in Scotland—the case of the feoffees of Heriot's Hospital *v.* Gibson; and several cases have occurred in the courts of equity in this country. It was my fortune to have to consider the matter very minutely, in the case of Squire *v.* Campbell, in the first volume of *Mylne & Craig*, p. 459, in which I thought it my duty to review all the cases that had occurred in the one country and in the other, for the purpose, if possible, of establishing a rule which might be a guide on future occasions when similar cases should occur; and I found that, certainly, what had been very much the opinion of the profession in this country, namely, that the parties were bound by the exhibition of such plans, had met with a very wholesome correction by the doctrine laid down by Lord Eldon and by Lord Redesdale in the case of Heriot's Hospital—a case coming from the Court of Session, and afterwards decided by this House. Under the authority of that case, where the point was very distinctly raised and deliberately decided upon by those two very learned lords, I came to the conclusion that there was no ground for equitable interposition.

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Now, my Lords, not relying upon the authority of Squire *v.* Campbell, but relying, as we are bound to do, upon the case of the feoffees of Heriot's Hospital—that being a decision of this House—I consider that this is a rule to which the courts of this country, and the Court of Session in Scotland, and this House must hereafter adhere.

Now, my Lords, taking that, then, to be the rule in examining the facts of this case, and the Act of Parliament upon which the question turns, we are not to look at what was represented upon the plan, except so far as its representation is incorporated in and made part of the Act of Parliament; and the real question, therefore, turns upon this,—whether the Acts of Parliament do or do not make the datum line and line of railway with reference to that datum line, the subject matter of these enactments, and the rule by which the rights of the parties are to be regulated; or whether it also includes the surfaces which in this instance, accidentally no doubt, had been very much misrepresented upon the plan.

We are first of all, then, to refer to the Act of Parliament under which this railway is to be carried into effect, and the enactment is to be found in the sixteenth section. I may here observe, before I refer to that section, that everything which is out of the Act is to be found in the Standing Orders of the one House or of the other; and the plans which are required to be exhibited by those Standing Orders, except so far as they are made part of the Act, are, as I apprehend, entirely out of the question; because it may be very convenient that Standing Orders of this or of the other House should require plans to be exhibited, containing matters which are not binding between the parties. But still, when we are looking to what the rights of the parties are, we can only look to the Act of Parliament by which those rights are regulated. Plans or proceedings previous to the enactment can have no effect upon the enactments themselves.

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Now the sixteenth section of the Act of Parliament says: "And whereas plans and sections of the railway, showing the "line and levels thereof, and also books of reference containing "the names of the owners and lessees, and occupiers of the land "through which the same is intended to pass, have been depo- "sited with the sheriff-clerks of the counties of Edinburgh, "Selkirk, and Roxburgh: Be it enacted, that, subject to the "provisions in this and the said recited Acts contained, it shall "be lawful for the said company to make and maintain the said "railway and works in the line and upon the lands delineated "in the said plans, and described in the said books of reference, "and to enter upon, take, and use such of the said lands as "shall be necessary for such purpose." Here is a parliamentary authority, which of course cannot be disputed, that the parties are to be at liberty to make "the railway and works in the line "and upon the lands delineated on the said plans." We have, therefore, to look only to what is the meaning of the word "line" as used in this Act of Parliament. The reciting part of that section speaks of "lines" and "levels;" it is therefore necessary to look to other Acts, (the general Acts being required to be incorporated and made part of this Act,) to see what is the meaning of those terms used in this section, because this is a power under which the railway company are to act; and if they bring themselves within the meaning of that enactment, explained by provisions and sections to be found in other Acts of Parliament, beyond all doubt, they are then performing the powers which the legislature intended to vest in them.

My Lords, in the Act for consolidating in one Act certain provisions usually inserted in Acts authorizing the making of railways in Scotland, we have several sections to which it appears to me to be necessary to refer. The seventh and eighth I only refer to for the purpose of observing that the plans which are there referred to are in cases where, after the original plans have been deposited, it has been found that they contain

certain errors; and then it defines the means by which the parties are to correct those errors and to make their plans correct. But the eleventh section contains this provision: "In making "the railway, it shall not be lawful for the company to deviate "from the levels of the railway as referred to the common "datum line described in the section approved of by Parliament, "and as marked on the same, to any extent exceeding in any "place five feet." It then provides for the case of passing through a town as to which other provisions are introduced. The description, therefore, of the levels, when it speaks of the levels of a railway, is in very distinct terms; it describes the level of the railway as referring to the common datum line described in the sections approved of by Parliament.

Then comes other clauses, to which I need not particularly refer. The fifteenth provides for a lateral deviation which is not in question in the present case. The power which is given by that section has been acted upon, and it is not contended that the lateral deviation does exceed those powers. Then comes the enactment of the sixteenth section of the appellants' Act: "That, subject to the provisions in this and the said "recited Acts contained, it shall be lawful for the said company "to make and maintain the said railway and works in the line "and upon the lands delineated in the said plans." And then it goes on to enumerate the works which the company is to be authorized to make.

Now, my Lords, taking these enactments—because I do not find that the other Acts contain any provisions which are very material to be attended to—taking these two enactments together, it appears to me to be quite plain, that the legislature intended, in speaking of lines and speaking of levels of the intended railway, to confine those provisions and to refer them to the datum line, and not to any other representation.

Although, my Lords, great convenience may arise from the plans and sections required by the Standing Orders to be exhi-

bited previous to the application to Parliament for powers to make railways, representing the surface as well as the datum line, and the intended line with reference to that datum line,—yet if any difficulty should arise as to the construction to be put upon these sections to which I have referred, we must recollect that Parliament must be supposed to have had before it, not only the line as explained in these sections, but also the other surface line which is exhibited in the plan. But the enactment totally disregards the surface line, and confines it in terms to the datum line—to the line of railway to be measured and ascertained with reference to its distance from that datum line.

I say then, my Lords, that a case does arise upon these provisions of the Acts in which the plan may be referred to, but referred to only to ascertain the line of the railway with reference to the datum line. It is not referred to with reference to any surface level; the plan, therefore, is entirely out of the enactment, and is not to be referred to for the purpose of construing the enactment as to any part of it, except so far as it is referred to and incorporated in the Act.

My Lords, arriving at that construction of the rule upon the provisions of the two Acts to which I have referred, and then applying to it the principle which has been established in Scotland, and by this House, in the case of the Feoffees of Heriot's Hospital, and acted upon in the Court of Chancery in the case of Squire and Campbell, we can have no difficulty in coming to the conclusion, that the application of that principle will necessarily lead to the construction of the clauses to which I have referred. The plan is binding to the extent of the datum line, and the line of railway measured with reference to that datum line; but it is not to be referred to for the purpose of surface levels, because the Act does not apply for that purpose, but cautiously confines the enactment to the other plans to which I have already referred.

My Lords, therefore acting upon the principle so established,

and with reference to the construction which I conceive to be the construction to be put upon these sections, although we cannot but greatly lament the hardship which, in all probability, these circumstances have imposed upon the pursuer, in having his land interfered with in a manner which he did not at all anticipate; yet, when we are called upon to consider whether the Court of Session are correct or not in suspending the further acts of the company, with reference to the mode in which they were to pass his land, we are bound to look what are the powers which these Acts vest in the company, and according to the opinion which I have formed, for the reason which I have already explained, I come to the conclusion that the company have not exceeded those powers, and do not propose to exceed those powers in the plans that they have formed, and therefore, that the Court of Session have been in error in granting their interdict against this company.

LORD CAMPBELL. I must admit, my Lords, that in this case I have felt very considerable doubts as the argument proceeded, and I acknowledge that I come to the conclusion at which I have arrived, with very great reluctance. It seems to me to be a case of very great hardship upon Mr. Tod. He, looking to the plans lodged under the Standing Orders of the House of Commons, and also of this House, had every reason to believe that there was no danger of the railway passing his avenue—his approach—in a manner that could seriously destroy the convenience or amenity of his place of residence, and he might very reasonably abstain from offering any opposition to the bill before Parliament upon that representation.

But, however, my Lords, when we come to consider what the law upon the subject is, I feel bound to concur in the opinion which has been expressed by my noble and learned friend, the Lord Chancellor.

The first question, as it seems to me, to be considered, is

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this: what is the legal construction of the Act of Parliament? Do the company, or do they not, propose to exceed the powers which the Acts of Parliament confer upon them? Now, it is admitted that if the deviation is to be calculated from the datum line alone, that they have not; because, neither vertically nor laterally, do they exceed the powers of deviation which are conferred upon them by their Acts of Parliament.

Well, then, that raises the question, whether those powers of deviation are to be calculated from the datum line alone, or whether the surface line is to be taken into consideration; and my opinion is, (and I have no doubt at all about this—I never had much doubt about it,) that the Act of Parliament does refer everything to the datum line. I think it is evident that the eleventh section of the 8th and 9th Victoria, chapter 33, clearly makes the datum line alone that which is to be regarded.

My Lords, the word "levels" in the plural, really does not, in my opinion, at all include the surface levels. It refers to the levels on the datum line which point out the course the railway is to go. If that be so, the company do not propose to do anything that they are not authorized to do according to the letter of the Act of Parliament.

Now, there certainly was a representation made here on the part of the company, when they proposed to bring in an Act of Parliament, by which they intimated that at that time the intention was, that the railroad should be fifteen feet four inches below the surface of Mr. Tod's property at the point of intersection; and that the bridge by which his approach would pass the railway, would not be more than three feet. But then, my Lords, this was merely an intimation on the part of the company, that such was their intention. An Act of Parliament of this sort has, by Lord Eldon, and by all other judges who have considered the subject, been considered as a contract.

Well, then, this was a negotiation—it was a contract. We must disregard what took place previously; we must look to

see what the contract is. The contract, my Lords, is to be gathered from the words of the Act of Parliament, and that brings us back to the question that I first considered—what is the construction of the Act of Parliament? That Act of Parliament must be considered as over-ruling and doing away with everything that had taken place prior to the time when the Act of Parliament passed, and renders the representation or proposal of the company, pending the passing of the Act of Parliament, of no avail.

Now, many cases have occurred in the courts of common law, in which it has been held, that everything that takes place before a written contract, signed by the parties, is entirely to be disregarded in construing the contract by which they are bound.

Now, if Mr. Tod had been cautious, he would have done what I would strongly recommend all gentlemen hereafter to do under similar circumstances, which is to have a special clause introduced into the Act of Parliament, to protect his rights. I do not believe that there is any committee either in the House of Commons or in the House of Lords, who, if he had asked for a clause providing that the railroad at passing his approach should be fifteen feet four inches, (with a power of vertical deviation perhaps,)—that it should be of that depth in crossing his approach, and he should be able to pass it by a bridge not more than three feet—would not have acceded to the insertion of such a clause, as a matter of course. For it is only reasonable that his property should be protected in this manner, and that he should be saved from such a deformity being erected in the sight of his dwelling-house, which would for all time to come be a great nuisance, and might diminish its value. But he abstains from introducing any such clause, and therefore he must be considered as acceding to the company having all the powers which the Act of Parliament confers upon them. The Act of Parliament confers the powers upon them of deviating a hundred yards laterally, and I think five feet vertically, without

any qualification whatever. The company do not propose to deviate to a greater extent. They are, therefore, within the powers—they are not exceeding the powers which are conferred upon them; they are acting according to the contract that must be supposed to be entered into by them with Mr. Tod.

My Lords, I have read with very great attention the case of the Feoffees of Heriot's Hospital, and with very great attention, the most admirable judgment of the Lord Chancellor in Squire *v.* Campbell, in which all the cases upon this subject are reviewed; and these cases remove all doubt from my mind, and induce me now—I may say without hesitation, although I again repeat with very great reluctance—to come to the conclusion, that neither upon the construction of the Act of Parliament, nor upon the ground of the representation that was made, is there any sufficient reason why this interdict can be supported.

I therefore agree in the judgment which has been expressed by my noble and learned friend.

It is ordered and adjudged, That the said interlocutors, so far as they are complained of in the said appeal, be, and the same are, hereby reversed; and that the cause be remitted back to the Court of Session in Scotland, or, if the Court of Session shall not be sitting, to the Lord Ordinary officiating on the bills during the vacation, to do therein as shall be just, consistently with this judgment.

[HEARD *27th June*—JUDGMENT *13th August*, 1846.]

JOHN CUNNINGHAME, ESQ., of Hensol, *Appellant.*

RODERICK MC LEOD, surviving Trustee appointed by the deceased Anne, Lady Ashburton, *Respondent.*

*Deeds.—Writs.—Records.*—It is no objection to the validity of a deed, that within the six months allowed by the Statute 1685, cap. 38. after the deed had been given in to be recorded, and an extract of it had been issued by the keeper of the records, as if it had been recorded, but before it had been actually booked in the register, it had been borrowed up from the keeper of the register, and an error in its testing clause corrected by words introduced.

*Revocation.—Onerous or Gratuitous.*—Where the lands of a woman are, by the settlement upon her marriage, limited to the issue of the marriage, and failing such issue, to her "nearest heirs at law," it is in the power of the woman after dissolution of the marriage, by divorce, without issue, to convey the lands away from her heirs at law, as not being parties having an onerous claim under the settlement.

*Faculty.*—Found that a faculty, reserved in a marriage settlement which directed the trustees of the settlement to execute an entail of lands upon the issue male and female of the marriage, whom failing, to such persons and uses as should be named and appointed by the wife in any deed of settlement or writing executed by her during the subsistence of the marriage, or after its dissolution by the *death* of the husband, was well executed by an absolute disposition, not containing any reference to the faculty, and made after the dissolution of the marriage by the *divorce* of the husband.

ON the 29th of June, 1826, Lady Ashburton made a trust disposition, whereby on the recital of a contemplated marriage between her and Ranald G. Macdonald, and of a contract of marriage between them, whereby Macdonald had renounced any claim for tocher and his *jus mariti* and right of courtesy, and

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whereby it was agreed that she should have the power in regard to her estate, real and personal, which by this trust-disposition she reserved to herself, she conveyed her real and personal estate to trustees, of whom the respondent was the survivor, in trust, in the first place, for payment of her debts, and after this, during the joint lives of herself and Macdonald, to pay her the interest and dividends for her own separate use, and upon her own receipt; and, in the event of Macdonald predeceasing her, to pay the interest and dividends to her, her heirs, executors or assignees; but in case she should predecease him, then to hold the annual proceeds in trust for the children of the marriage in such proportions as she should appoint; and in the event of there being no children, for such persons as she should appoint by her last will, or any writing of the nature of a deed of settlement: "Providing "further, as it is hereby declared, that if I shall happen to die "before my said intended husband, it shall be lawful to me, by "any deed of settlement, or by my last will and testament in "writing, or by any codicil or codicils thereto, or any writing "or writings of the nature of a will or codicil, to direct and "appoint any sum or sums of money, not exceeding in whole "the principal sum of ten thousand pounds sterling, to be "levied or raised out of the trust-funds and estate hereby con-"veyed, and to be paid and applied to such person or persons, "and to such intents and purposes as I shall think proper, and "shall, in and by such deed of settlement, will, codicil, or "writing, express or declare, and my said acting trustees or "trustee for the time are hereby directed and required to levy "and raise, and pay and apply the said sum accordingly, not-"withstanding of any thing contained herein to the contrary. "And further, it is hereby specially provided and declared, that "it shall be lawful to, and in the power of my said acting "trustees or trustee, and their or his aforesaid, and they or he "are hereby authorized and directed, as soon as conveniently "may be, to purchase at and for such price or prices as to them

" or him shall appear reasonable and proper, such part or parts " of the estate of Arisaig, in the county of Inverness, including " the mansion-house and grounds belonging to, and at present " in the occupation of, the said Ranald George Macdonald, as " my said trustees or trustee shall think proper; together also " with one or more freehold qualifications entitling the holder " to vote for a member of Parliament for the said county of " Inverness: and in case of my said trustees or trustee being " unable to conclude a bargain for such part or parts of the said " estate of Arisaig, on such terms as they shall think reasonable, " then it shall be lawful to them or him, and they or he are " hereby authorized and directed, as soon thereafter as conveni- " ently may be, to purchase at and for such price or prices as " to the said trustees or trustee shall seem reasonable and " proper, any other landed estate in Scotland that they may " think preferable, and also one or more freehold qualifications " entitling the holder to vote for a member of Parliament within " the county or counties where the lands so to be purchased " may be situated; and either in one purchase or in several " purchases, and to levy and raise the money, which shall be " wanted for making the said purchases respectively, by and " out of the said trust-monies, stocks, funds, and securities, and " to pay and apply the sum or sums of money so to be levied " or raised in such purchase or purchases accordingly. But it " is hereby expressly declared, that it shall not be obligatory " upon my said trustees or trustee, or their and his aforesaid, to " make any such purchase or purchases at and for any greater " price or prices than they or he shall think reasonable: and " further, it is hereby provided and declared that, upon the " completion of the said purchase or purchases of the said " landed estate in Scotland, the disposition or dispositions, or " conveyances thereof, shall be taken to, and in favour of, " my said trustees or trustee, and their or his aforesaid, as par- " ticularly before specified, in their character of trustees or

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" trustee, to be held by them in trust, to pay and apply the " rents, issues, and profits thereof to such person or persons " and for such ends, uses, and purposes as I shall from time to " time, notwithstanding my marriage, and whether I shall " remain married or single, appoint, by any writing under my " hand: but not so as to dispose of, or affect the same, or any " part thereof, by any sale, mortgage, or otherwise in the way " of anticipation; and failing such direction or appointment, the " said rents, issues, and profits shall be paid by my said trustees " or trustee into my own hands, for my sole and separate use " and benefit, independently and exclusively of the said Ranald " George Macdonald, or of any future husband after his decease, " and without being in any way subject to the debts, claims, " control, interference, or engagements *jure mariti*, or by right " of courtesy or otherwise, or the debts present or future of the " said Ranald George Macdonald, or of any future husband I " may intermarry with, or to the diligence of their or either of " their creditors; and my own receipt in writing, or the receipt " of any person appointed by me from time to time, whether " married or single, shall be sufficient and valid discharges for " the same to my said trustees or trustee, and their or his afore- " said: and further, as soon as my said trustees or trustee shall " have completed a proper feudal title in their persons to the " said landed estate in Scotland, and freehold qualifications so " to be purchased, it shall be incumbent upon, and I hereby " authorize and require them to execute a deed or deeds of strict " entail of the said landed estate and freehold qualifications, " disponing and conveying the same after my decease (but " always under and subject to all the clauses, prohibitory, " irritant, and resolutive, necessary and accustomed, by the law " of Scotland, according to the most approved styles of convey- " ancing, for constituting a perfect entail, in all points effectual, " according to the act of the Scottish Parliament, passed in the " year one thousand six hundred and eighty-five, chapter twenty-

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" second,) to and in favour of the eldest son to be procreated " of the said marriage between the said Ranald George Mac- " donald and me, and to the heirs whatsoever of the body of " such eldest son." Then followed a series of substitutions, which closed with the following: " And failing issue, male or female, " of my said intended marriage, to such person or persons, or " to such uses and purposes, as shall be named and appointed " by me in any deed of settlement or other writing to be exe- " cuted by me, either during the subsistence of my said intended " marriage, or after its dissolution, by the decease of the said " Ranald George Macdonald; whom all failing, to my own " nearest heirs at law. And the said deed of entail shall contain " all the clauses, prohibitory, irritant, and resolutive, usual and " accustomed, by the law of Scotland as aforesaid, so as to make " the same binding and effectual on the disponee or institute, " and on all the heirs of entail, in terms of the said Act of Par- " liament one thousand six hundred and eighty-five, chapter " twenty-second, before referred to. And it shall be incumbent " on my said trustees or trustee to get the said deed of entail " duly recorded, in terms of the said Act of Parliament. Which " subjects before conveyed, with this right and conveyance " thereof, I, the said Anne Selby, Lady Ashburton, bind and " oblige myself and my aforesaids, to warrant to my said " trustees or trustee and their aforesaids, and to their disponees " or assignees at all hands and against all mortals, as law " will."

The trustees accepted of the trust put upon them by this deed, and, in the year 1829, purchased the lands of Arisaig, which they feudally vested in themselves by infeftment.

In the same year, 1829, the marriage between Lady Ashburton and Macdonald was dissolved by a decree of divorce obtained by her, without any issue having been born of the marriage.

On the 12th of July, 1833, Lady Ashburton sent to her

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law agent, who was one of the trustees under the deed of 1826, a holograph writing or paper of instructions for her will, in which were the following expressions: "The property of Arisaig "to be left *absolutely* to Lord Cranstoun, *whom failing*, the "property to be sold, and out of the purchase-money is to be "given, &c.:" then followed a variety of legacies: "I make "my brother, John Cunninghame, and Lord Cranstoun, execu- "tors of my will. I reserve the right and power to change the "will, should circumstances render it necessary."

On the 24th of March, 1834, Lady Ashburton, who was then in Paris, wrote out, and signed and sealed in the presence of two witnesses, the following paper: "The deed making out "to put Lord Cranstoun in possession of Arisaig at my death, "not having reached me to be signed by me, and witnessed by "others, may cause a dispute. I here repeat, that I leave him "that property; and, as I may now be in a dying state, I desire "that this paper may be considered as my last will and testa- "ment, which is witnessed by James Elton, Esq., and Dr. "Chermside, my physician."

This paper her ladyship transmitted, on the 28th March, 1834, to her solicitor in London, inclosed in a letter in these terms: "The inclosed was written by me at a time when I was "doubtful whether I could live above a few hours. By mistake "my maid gave me a large teaspoonful of laudanum instead of "red lavender. I am very uneasy at the Scotch deed being "delayed so long; and the paper I now send is to show "what my intentions are, to enable them to be carried into "execution, although the deed is not here. It may not be "made out *according* to law, but my meaning cannot be mis- "understood. I am still too unwell to leave Paris; but on "Saturday or Sunday we hope to be at Fontainebleau, where "we shall remain until we are told we can pass the Jura moun- "tains.

"After all the legacies are paid out of the funded property,

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"what will the balance be which remains? My head is "still very much confused, but I hope you will make out my "meaning."

On the 21st May, 1835, Lady Ashburton executed an absolute disposition as "heritable proprietrix of the lands of Arisaig," in favour of James Lord Cranstoun, his heirs and assignees whomsoever, heritably and irredeemably, and obliged herself to procure herself duly infeft, and seised in the lands, and granted procuratory and precept for infefting the disponee in ordinary form. This deed made no reference in any part to the trust disposition of 1826, nor to any right existing in the trustees of that deed, nor to any power reserved to her by it. The testing clause of the disposition, as originally written, bore that it had been signed in presence of "David William Crammord," as one of the instrumentary witnesses.

Lady Ashburton died in July 1835, being survived by Macdonald, her divorced husband, without having obtained from the trustees of the deed of 1826, any conveyance to herself of the lands of Arisaig, or in any other way procured herself to be infeft in these lands.

The disposition in favour of Lord Cranstoun was given in to the keeper of the register at Edinburgh, upon the 8th day of August, 1835, in order to its being recorded, and upon the 11th of that month an extract of the deed was given out by the keeper, as if it had been recorded. In the month of January 1836, the solicitor in Edinburgh of Lord Cranstoun, discovered that the true name of the instrumentary witness who has been referred to, was Crammond, not Crammord. In consequence, he returned to the keeper of the register, the extract of the disposition which he had obtained, and borrowed from him the disposition itself, which had not as yet been entered upon the books of the register, and transmitted it to London, to the solicitor in whose chambers the deed had been prepared and executed, where the following addition to the testing clause

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was made by the same person by whom the deed had been written: "The name of the last subscribing witness being "David William Crammond, the letter *r* next the letter *d* in "his last name, as originally written, being a clerical error, "and these fifty-nine words, counting each of the said letters "*r* and *d* as a word in addition to the testing clause, being "written by the said William Clarke."

Afterwards the deed was returned to the record on the 4th February, 1836. An extract of the deed, which was libelled upon in the action to be presently mentioned, bore that the deed had been given in to be recorded on the 8th of August, 1835; but it contained the addition to the testing clause, which has been mentioned; whether this was the original extract with this addition made to it, or a new extract issued after the return of the deed to the register, did not appear.

The respondent, as the surviving trustee under the deed of 1826, brought an action against the appellant, as the heir-at-law of Lady Ashburton, setting forth the deeds which have been detailed, that he had been required by Lord Cranstoun, to convey to him the lands of Arisaig, but that he could not safely comply with that demand without the consent of the appellant, or the decree of the Court; and that the appellant had refused to give this consent. The summons therefore concluded, that it should be found that "in consequence of the "dissolution of the foresaid marriage between the said Ranald "George Macdonald and the said Anne Selby, Lady Ashburton, "by the foresaid decree of divorce, and there never having "been any issue of the said marriage, there was then, and also "at the time of the execution of the foresaid disposition by the "said Lady Ashburton, in favour of the said James Lord "Cranstoun, no person interested in the foresaid lands, supe- "riorities and others, purchased as aforesaid by the pursuers "and the said William Groom, as trustees foresaid, excepting "the said Anne Selby, Lady Ashburton, herself, and that she

" thereby had the full and unlimited power to alter and revoke " the purposes for which the foresaid trust-disposition was " granted by her in favour of the pursuers, and the said " William Groom, and to direct and appoint, or to authorize " and empower them or their aforesaids, to dispone and convey " the foresaid lands, superiorities, and others before described, " with all right and interest belonging or relating thereto, and " to denude of the foresaid trust to that extent, at any time, " and in favour of any person or persons she might think " proper to name;" and that Lady Ashburton, by the disposition of 21st May, 1835, had revoked the authority in the deed of 1826 to the trustees of that deed, to execute an entail of the lands of Arisaig in the manner therein specified; and that the writings left by Lady Ashburton, and particularly the disposition of 21st May, 1835, constituted sufficient directions and authority to the respondent, to convey the lands to Lord Cranstoun, his heirs and assignees, in implement of the disposition and other writings; and that he was bound and ought to execute such a conveyance; and it should be declared that the conveyance, when executed, would form a valid and sufficient title to the lands in the person of Lord Cranstoun.

In the course of this action, the respondent produced the holograph writings by Lady Ashburton, of 12th July, 1833, and 24th March, 1834, upon which he pleaded that even if the disposition of May, 1835, were invalid, these writings excluded the appellant from the succession to Arisaig, and gave Lord Cranstoun a good title to have the lands conveyed to him.

The appellant pleaded in defence to the action:

" I. As the funds under the management of the pursuers were " conveyed to them in trust for certain purposes, and, among " others, for the purpose of being invested in lands to be strictly " entailed on the heirs of the marriage, and on the failure of " them, and of any other parties to be named by Lady Ash-

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" burton, on her nearest heirs-at-law; and as the trust-deed " contained no power of revocation, the pursuers are bound " to proceed with the execution of the trust, and to execute a " strict entail of the lands of Arisaig and others, in terms of the " directions contained in the trust-deed.

" II. As the only powers reserved by Lady Ashburton over " the fee of the property conveyed to the pursuers, were to dis- " pose a portion of it to the extent of 10,000*l.*, and to nominate " and appoint other heirs of entail, besides those named in the " trust-deed, during the subsistence of the marriage, or after its " dissolution by the death of Clanranald, the disposition in " favour of Lord Cranstoun is inoperative and ineffectual; 1st, " Inasmuch as it is not a nomination of heirs under the entail, " but a disposition in fee-simple; and, 2nd, Inasmuch as it was " not executed during the subsistence of the marriage, or after " its dissolution by the death of Clanranald.

" III. Even supposing that Lady Ashburton had the power of " revoking the trust-deed, the disposition to Lord Cranstoun is " ineffectual, because it contains no express revocation of that " deed, and because it proceeds upon the assumption, contrary " to the fact, that Lady Ashburton was heritable proprietrix, " and invested with the full fee of the lands.

" IV. The disposition is further inoperative and ineffectual " as a conveyance of heritage, inasmuch as it is not duly tested " in terms of law.

" V. The addition made to the testing clause after the " granter's death, and after the deed had been recorded, is a vitia- " tion affecting the whole deed, and destroying its authenticity.

" VI. The holograph writings of Lady Ashburton are not " effectual to convey the estate of Arisaig to Lord Cranstoun " away from the defender as heir-at-law; nor do they constitute " any such obligation on him as heir-at-law to convey the pro- " perty to Lord Cranstoun, as admits of being enforced by " adjudication in implement, or otherwise.

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"The disposition subsequently granted appears indeed to "be at variance with these holograph instructions."

On the 6th February, 1840, the Lord Ordinary, (*Jeffrey*,) pronounced the following interlocutor, accompanied by the subjoined note:—

"The Lord Ordinary, having heard the counsel for the par- "ties on the closed record, and whole process, and made "*avizandum*, Finds, 1mo. That it is not competent for the pur- "suers, under the present summons, which rests the claim of "Lord Cranstoun to the lands in dispute entirely upon Lady "Ashburton's disposition thereof in his favour, of 21st May, "1835, to found upon the holograph writings cited and referred "to in Articles 6, 7, 8, and 9 of the Condescendence for the "pursuers, as separate instructions to her trustees for the set- "tlement of these lands; and that all their averments as to the "purport and object of those writings are therefore irrelevant "and inadmissible in the present process: Finds, 2do. That the "said disposition of 21st May, 1835, was a probative writ when "produced in judgment by the said pursuers in this process, "and must now be admitted, and receive effect, as the genuine "deed of the said Lady Ashburton; and repels the defender's "objection to the sufficiency or regularity of its execution "accordingly: Finds, 3tio. That the trust-disposition and assig- "nation executed by Lady Ashburton on 29th June, 1826, "in contemplation of her marriage with Ranald George Mac- "donald, can be considered as onerous or obligatory on the "granter, only in so far as it contained provisions or destina- "tions of heritage in favour of the issue of the said marriage; "but that, *quoad ultra*, it was purely gratuitous, and liable, *ita* "*natura*, to alteration or revocation by the granter, especially "by acts done or instruments executed after the dissolution of "the said marriage without issue, and when it was consequently "certain that the whole obligatory provisions had been finally "frustrated, and never could come into operation: Finds 4to.

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" That this complete restoration of the granter's absolute right " to and control over the disposition of her own property, " which would have emerged at common law, on the total " failure of such issue, is farther secured and provided for, in " this case, by the terms of the said trust-disposition and assig- " nation, in which it is expressly provided, that, on such failure, " the properties conveyed in trust shall be applied, not only for " the benefit of 'such person or persons,' but, generally, 'to " 'such uses and purposes as should be appointed by the said " 'Lady Ashburton, by *any deed of settlement, or other writing,* " 'to be executed by her at any period of her life;' it being " only in the event of her executing no such settlement or " writing that they are to go to 'her nearest heirs-at-law:' " Finds, 5to. That, though the feudal title to the property was " formally in the trustees, and they were bound to hold it, " independent of the will of the truster, in so far as the inte- " rests of the issue of the marriage were concerned, and till the " possibility of such was extinct, they must be considered as " holding it, from and after the period of such extinction, for " behoof of the truster herself only, and for such persons and " purposes as she might specify, in any writing sufficient to " express, and to certiorate them of the tenor and existence of " her wishes and intentions; and that they were in no way " bound, after such failure, to convey the said property only " under the burden and fetters of an entail; but might have " been lawfully called upon to denude thereof, in favour of the " truster herself, or to sell or dispose of the same, and to apply " the price in any way she might be pleased to direct: Finds, " 6to. That the disposition executed by the said Lady Ashbur- " ton, of the 21st May, 1835, in favour of Lord Cranstoun, " which contains not only a direct conveyance of the lands " themselves now in dispute, but also of 'all right, title, and " 'interest, and all claim of right, property, or possession, peti- " 'tory, or possessory, which she herself had, or could claim

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" 'or pretend thereto,' is not only a sufficient nomination and " appointment of the said Lord Cranstoun as the person to " whom these lands should be conveyed, on the failure of issue " of the marriage, in terms of the trust-disposition of 1826, but " is also a legal and effectual assignment of the right accruing " to the truster herself, on the occurrence of such failure, to " call on the trustees to denude and convey in her favour; and " that it is not necessary to the validity of such nomination or " assignment, by the law of this country, that it should purport " to be granted in the exercise of any reserved power, or any " special provision of the law; and therefore, and on the whole " matter, repels the defences, and decerns and declares in terms " of the conclusions of the libel: Finds expenses due; Allows " an account to be given in, and remits to the auditor to tax " and report.

" F. JEFFREY."

" *Note.*—The grounds of the first finding are sufficiently " apparent, on comparing the summons and the record. The " second, as to the defect in the testing clause, and the efficacy " of the correction resorted to, admits of more question. The " Lord Ordinary is not quite satisfied that the variance in the " spelling of the witness's name is so great as to be fatal, if not " corrected. But he does not *rest* on this point. He thinks " the case of the Bank of Scotland against Telfer's creditors, " 17th February, 1790, a precise authority for holding, (however " perilous and questionable, upon principle, the doctrine may " appear,) that such errors may be corrected *ex intervallo*, in " the way that was here done, and where much more had " happened since the actual signature and execution of the deed " than can be alleged in this case. In the case of Brown, " (11th March, 1809,) it was shown, in the course of the argu- " ment, that more had been done with the deed before any " proposal was made to supply its defects, than merely giving it

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" in to be recorded in the register of the Sheriff Court; and, in " point of fact, it was produced in this Court in its original " defective condition. But, even holding that it was there " found incompetent to correct it, solely on the ground that it " had been put on the Sheriff's register, the Lord Ordinary is " satisfied that this objection would not apply to the present " case, in respect of the special provision in the Act 1685, c. 38, " by which persons giving in deeds to be recorded in the " general register at Edinburgh are entitled to take them back " again at any time within six months after their first ingiving; " and that it depends entirely upon their pleasure whether they " are ever afterwards returned to the record, and in what condi- " tion; the fact being admitted that it was long within the six " months, and in the regular exercise of this privilege, that " the deed was in this case taken back for correction, and after- " wards returned and recorded in its amended form.

" With regard to the other and more general findings, as to " the *construction* of the deeds, and the *powers* of the granter, " there is not much to be added to the grounds set forth in the " interlocutor, which contains all that it is thought necessary to " express as to the *principles* on which the judgment is rested. " The *authorities* chiefly relied on are those of Gordon and " Harper, 4th December, 1821, and of Hyslop and Maxwell, " 11th February, 1834, (12 *Shaw*, 413,) both of which seem to " be cases *a fortiori* to the present, inasmuch as the properties " there held to be effectually conveyed, by direct dispositions " executed by parties not actually vested in the fee thereof, did " not originally belong in substance and effect, (as is the case " here,) to the parties so disponing, but had been derived from " other persons, by whose act, (and not by their own,) a bene- " ficial interest in them had been acquired. Both these cases " were very deliberately considered; and it is not thought that " their authority, or application to the questions now at issue, " can be much affected by Lord Gifford's reversal of the judg-

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" ment of this Court in that of Turnbull and Tawse, decided " here in January 1823, and reversed (see I. *Wilson* and *Shaw's* " Appeals, 80,) 15th April, 1825. The Lord Ordinary must " say, that he cannot help entertaining doubts of the soundness " of the views on which this reversal seems to have proceeded, " and is far from feeling any assurance that the Court would " hold themselves bound by its authority in any similar case. " but, for the present, it is enough to say, that it has truly *no* " *similarity* or application to the present case. There the pro- " perties ultimately conveyed in trust had been originally " destined, in an antenuptial contract of marriage, to the parents " in liferent, and the children of the marriage in fee; but " under such a form of expression as to leave the fee and " onerous disposal of the property in the mother, who at an " after period, conveyed it to trustees for payment of certain " definite and limited debts; the liferent of the whole residue " being then provided to herself, and the fee, on her decease, to " her children then extant, and severally mentioned *nominatim* " in the deed. Having subsequently contracted large additional " debts, she then made a *second* or supplementary trust-deed, " directing the trustees to apply the properties, in the first " instance, to the payment of those new debts also; and this " last deed, being challenged as beyond her powers, by her " children, was sustained by the judgment of this Court, but " ultimately set aside and reduced in the House of Lords. " Now, even holding this last decision to be undoubtedly right, " it is obvious that the claim of the children was there rested " upon grounds, to which it is impossible to pretend that there " is anything parallel in the case of the present defender. The " claimants there were the *immediate children* of the granter, " entitled to provisions out of her funds, not merely *jure naturæ*, " but as having, in point of fact, a *jus crediti* over them, in " terms of the antenuptial contract, liable to be defeated only " by the competition of onerous creditors. In that situation,

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" and in implement of this natural and legal obligation, the " mother conveys the fee of certain properties to trustees for " them, (then all existing, and severally named in the settle- " ment,) under the single burden of certain specific and limited " debts; and upon this conveyance the trustees are infeft, for " behoof (in so far as concerned the fee) of the said children " exclusively, and without any reservation on her part, of power " either to revoke or alter generally, or to interpose other " 'persons or purposes' between them and the fee so ultimately " destined. In the present case, on the other hand, the desti- " nation on which the defender relies, is neither to a child or " descendant of the granter, nor to any one having any natural " or legal claim upon her, nor, finally, to any one definite " person known or contemplated at the time as an existing " individual, but merely in the most general terms, and *ultimo* " *loco*, in the event of no special disposition being made, to " whomever might happen in that event to hold the character " of her nearest heir-at-law; and then there is, besides, (which " is *per se* decisive,) the most distinct reservation of power, on " the failure of issue of the marriage, to destine the property to " any persons or purposes she might choose to specify, by any " writing under her hand. It is impossible, therefore, to con " ceive a case, in all its essential particulars, more unlike to " that of Turnbull.

" The Lord Ordinary has always understood, that where a " trust comes to subsist only for the interest and behoof of a " single person, and his heirs or assigns, and especially where " that person is the truster himself, by whose mere will and " gratuitous act it was *quoad hoc* created, and is subsisting, it is " completely in the power of such person or truster to revoke " the trust, and to call on the trustees to denude in his own " favour, or in that of any person he may choose to designate. " This was admitted, upon all hands, to be the rule in the " remarkable case of Torry Anderson, 2d June, 1837, (15 Sh.

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" 1073,) even where the trust bore, in express terms, to be " *irrevocable*, though the specialty of the trust being in that " case viewed as intended for the protection of a woman about " to marry against the influence or importunity of her husband, " led (though with great difficulty) to the conclusion, that it " could not then be recalled. But, after the *final* failure of " issue of the marriage, it is manifest that the only persons for " whom the trustees could hold, in this case, were the truster " herself, or those whose right depended entirely on her will " and pleasure; that is, her express nominees, or, on failure of " them, those who would take through her, and in her right, " (either from the trustees or her *hæreditas jacens*,) as her heirs- " at-law; and if it would be absurd for the trustees to resist " such a demand, on the ground that there was a vested interest " which they were bound to protect, in her future possible " nominees, who must owe their existence entirely to her " pleasure, there must be the same absurdity in the defender's " notion of there being any such vested interest in 'her heirs- " 'at-law,' who are distinctly postponed to all such nominees, " and whose chance of succession depends exactly as it would " do if there had been no trust in existence, on her forbearance " to execute any such nomination. A man may, no doubt, " make an irrevocable destination in favour of his own *existing* " children, or (by means of a trust) even for those who are yet " unborn. But it is not easy to understand how he can ever " tie up his own hands by a destination *to his own heirs what-* " *soever;* which, in fact, is no destination at all, but precisely " *the negation of all destination*, and incapable, therefore, of " being set up against any act of the party which would be " available if there had been no mention of heirs whatsoever in " the deed.

" A very desperate argument was raised by the defender on " the circumstance, that, in describing the deed by which Lady " Ashburton reserves power to herself (on failure of issue) to

" dispose of the property at her pleasure, it happens to be " stated, with the obvious purpose of making the power as " large and absolute as words could make it, that she might " effectually do this, 'by any deed of settlement, or other " 'writing, to be executed either during the subsistence of her " 'marriage, or after its dissolution, by the decease of the said " 'Ranald George Macdonald,' upon which the defender has " been advised to contend, that, as the marriage was dissolved " in this case, *not by the decease* of the said Ranald George, but " *by his being divorced for adultery*, and as the deed in favour of " Lord Cranstoun was executed while he was still alive, so it " was not in terms of the reservation, and must, therefore, be " disregarded, and found to be utterly null and ineffectual. " This probably does not require any answer, though there are " many that will readily occur. Two only shall be given. In " the *first* place, the expression referred to was plainly intended " only to make it certain that the deed in question might be " competently made by the act of the lady alone, and without " the consent of her husband, even during the subsistence of " the marriage; the true and obvious meaning being, 'as fully " 'and effectually during the subsistence of the marriage, as " 'after its dissolution,' when, by the common rules of law, " there could be no question as to her power. But, *secondly*, " the only mode of dissolving a marriage which is ever contem- " plated or provided for, or which it is *decent* to contemplate or " provide for in a marriage-settlement, is by the *death* of one or " other of the parties. But the *law* has declared, in aid, but " entirely independent of their stipulations, that the conse- " quences of its dissolution by the *delinquency* of either party " shall be in all respects the same as would have resulted from " the natural death of the party offending. Accordingly, " though all provisions of jointure, &c. to a wife are uniformly " declared, in such settlements, to be payable only on the *death* " of her husband, it is perfectly established, that she has access

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" to them in the event of his being divorced for adultery or " desertion, exactly as if he were naturally dead; and if this be " the rule as to the provisions which immediately affect his " interests and means of living, it would be strange if it did " not hold as to the wife's *mortis causa* disposition of her own " properties, in the ultimate succession to which he could, in " no event, have any interest or concern.

" F. J."

The appellant reclaimed against this interlocutor, and (on the 26th of June, 1840,) the Court ordered the disposition of 1835 to be brought into Court, and remitted to the deputy clerk register to report "as to the practice that obtains in " recording and booking deeds presented for registration in " the books of Council and Session, and of granting extracts " thereof, whether within, or after, the expiry of six months " from the date of presentment; and as to the practice of with- " drawing deeds from the record, within six months from the " date of presentment, under the provisions in the Act of " Parliament 1685, cap. 38; and, further, to examine and " report what appears in the registers and other books of the " office, relative to the registration of the above-mentioned " disposition, dated May 21, 1835, the said report to be lodged " *quam primum*, and thereafter printed and boxed by the " parties."

The deputy clerk returned the following answer to this remit: "I may begin with stating, that prior to the Act of " Parliament 1685, concerning the registration of writs in the " books of Council and Session, I am not aware that there existed " any positive regulation as to the period from the date of pre- " sentment, within which deeds were to be *booked* or engrossed " *ad longum* in the registers kept for that purpose. Neither " does it appear from any document now remaining, whether " there then obtained any customary practice of withdrawing

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" from the keepers of the record, deeds that had been presented " for registration; but that such a practice may have existed, " similar in effect to what was afterward sanctioned and regula- " ted by statute, seems probable. There seems, however, to be " no doubt that, from time immemorial, it has been the usual " and ordinary practice to issue to the '*parties ingivers*,' formal " extracts of deeds, with all the requisite clauses for execution, " without awaiting their regular entry in the registers of the " Court, and bearing the official attestation of having been " 'extracted furth of the records of the Court of Session.'

" By the Act of Parliament 1685, which placed the business " of this department on a regular footing, it was, '*inter alia*, " 'appointed, that in each of the three offices for the registration " 'of writs, there should be two minute-books kept, in one " 'whereof there should be set down the title of writs given in " 'to be registrat, the name of the giver in, and the date of the " 'ingiving, and to be subscribed by the clerk or his substi- " 'tute.'—'That all writs so given in should be booked within " 'the space of one year after the ingiving; and if any party, or " 'one employed by him, should desire up a writ given in, with- " 'in six months after its ingiving, then the title of the writ, " 'the name of the party, and the date of both ingiving and out- " 'giving of the said writ, should be inserted in the other " 'minute-book, and be subscribed by the receiver thereof:' " 'that as the one minute-book doth charge, so the other " 'minute-book might discharge the clerk of such writs;'—and " it was further appointed, 'that when these registers are to be " 'given in to the general register house, the two minute-books " 'were likewise to be given in with them, subscribed by the " 'clerk; and the depute appointed by the Lord Register for " 'keeping of the said registers, should subscribe other doubles " 'of the said minute-books, to be kept by the clerks, for the " 'information of the lieges in their offices.'

" These provisions of the Act were ordained to take effect

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" from the 1st day of August in that year; and, accord-
" ingly, from that date, minute-books, specifying the titles
" of the deeds given in for registration, together with the
" other particulars required by the statute, (somewhat more
" fully than formerly,) were begun to be framed. On the mar-
" gins of these minute-books there occur entries in these terms,
" 'Principal writ out,' or 'Principal writ delivered up;' and in
" these cases it has been found that the deed referred to never
" has been *booked*; implying of course that the parties
" ingivers had availed themselves of the liberty recognised
" and sanctioned by the statute. That in these cases some
" more formal document must have been taken by the
" keepers for their exoneration, cannot be doubted; but it does
" not appear, after a careful search, that any minute-books of
" the kind prescribed for this purpose by the Act of Parliament
" had ever been framed; none certainly of that kind now
" remain among the public records. The substitute actually
" employed, and adopted probably from the former practice,
" appears to have been, to take an acknowledgment from the
" party ingiver of the redelivery of the deed, and a declaration
" that the extract given out at the time of presentment had been
" delivered up, in order to be cancelled. Of this mode thus
" adopted, the earliest instance now to be found on the books
" of the office is in the year 1707; it is the first of a series
" of similar entries written on the blank leaves of the minute-
" books of *ingivings*, and *responde* books of the different offices,
" preserved in the General Register House. It is in these
" terms:—

" '*28th Nov.* 1707.—Taken out of the register by me, James
" 'Ross, writer in Edinburgh, the principal bond granted by
" 'Charles Menzies, W.S., &c., to Christian Blackwood, &c.,
" 'dated 22d February, 1707, presented by me to be registered
" '25th November, 1707. The extract being returned to be
" 'cancelled.

(Signed) " 'JA. ROSS.'

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"The following may be given as another example of the "same kind:—

"'31*st March*, 1741.—Received out of the register by me, "'writer in Edinburgh, discharge and obligation by Sir James "'Mackenzie, to Sir William Dick of Prestonfield, dated 12th "'November, 1740 years, registered 12th November, 1740, and "'is now taken out by me, ingiver thereof, having delivered "'the extract to be cancelled.

(Signed) "'RODK. MACKENZIE.'

"Many entries of a similar tenor occur in the minute-books "and *responde* books of the different offices. And in all such "cases, it appears that the deeds had been withdrawn within "the period when they would have fallen to be *booked*, and of "course they are not to be found in the existing registers, at least "as of the date of the original *ingiving*. The same deeds might "of course be afterwards brought back at any time, and again "presented for registration; and of this proceeding the instances "are by no means very uncommon.

"Thus, on March 9, 1819, a discharge of inhibition by the "assignees of Atkins and Sons, &c., to Stenhouse Wood, dated "28th October and 7th November, 1818, was given in for regis- "tration, and thereafter given up on receipt; but again pre- "sented for registration on the 22nd of March, 1819; and the "deed is accordingly registered of that latter date.

"Again, on the 13th of March, 1819, a power of attorney by "Andrew Douglas M'Culloch, in Edinburgh, to John Graham, "dated 8th March, 1818, was presented for registration, given "up on receipt, and again registered on the 21st of April, "1819.

"These, and many other cases, apparently of the same kind, "appear to have been conducted in strict conformity with the "intendment of the Act of Parliament; nor has there been "found any instance of a deed withdrawn or given up after it

" had been *booked*, or recorded *ad longum* in the register. " Instances, indeed, occur, of special warrants by the Court, " authorizing deeds to be given up or borrowed, for specific " purposes, even after having been recorded, such as for the " purpose of being judicially produced in Court, and afterwards " recorded in the Register of Tailzies; but to cases of that des- " cription it is unnecessary here to advert more particularly.

" There is, however, another class of cases of by no means " unfrequent occurrence, where, within six months after the " date of presentment, deeds are 'borrowed' by the ingivers " upon receipt, avowedly in the view of being returned to the " keepers, and entered on the register as of the date of their " original *ingiving*. Of the receipts taking in such cases, the " following are examples:—

" 'Edinburgh, 31*st December*, 1767.—Borrowed up by me, " 'clerk to Thomas Innes, writer to the signet, principal dis- " 'charge and renunciation, the Royal Bank of Scotland to Sir " 'James Innes, of Innes, dated the 18th day of Decr. 1767, and " 'regd. in the books of Council and Session the 23d day of the " 'said month and year, to be returned on demand.
" 'Prin. returned.' " 'THOMAS RIDDOCH.'

" 'Edinburgh, 10*th July*, 1822.—Borrowed by me, W.S., " 'submission and decreet-arbitral, Jean and Alison Ponton, " '&c. and John Dawson, at Dalmeny, registered 9th current, " 'and in the meantime have deposited the extract.
(Signed) " 'WALTER FERRIER.'

" 'Edinburgh, 31*st July*, 1822.—Borrowed by me, W.S., " 'ratification and bond of corroboration, Chas. Halkett " 'Craigie, Esq., to Miss Hannah Halkett Craigie, and others, " 'dated 28th March, and registered 18th June last; and, in " 'the meantime, I have deposited the extract.
(Signed) " 'ALEX. MONYPENNY.'

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" ' *Edinburgh, 20th March,* 1824.—Borrowed by me, Alex-
" ' ander M'Craw, clerk to Alexander Young, W.S. prob. copy
" ' heritable bond by Alexander Murray, Esq. of Broughton,
" ' to the trustees of the Westminster Co., for 34,000*l.*,
" ' dated 26th Jany. 1824, and recorded 1st March following.

(Signed) " ' For ALEXR. YOUNG.
" ' ALEX. M'CRAW.'

" In these, and many similar cases, the receipts have been
" cancelled. The principal writs are preserved among the
" public records, and they are found to have been *booked* in the
" register as of the date of their original presentment. How
" long this practice may have prevailed, I have not ascertained.
" It cannot, perhaps, be condemned as in violation of the Act
" 1685; at the same time, it must be obvious that it derives no
" direct sanction from the provisions and regulations embodied
" in that statute.

" By your interlocutory order above referred to, your lord-
" ships have further directed me to report upon what appears
" in the registers and other books of the office, relative to the
" registration of the disposition by the late Lady Ashburton in
" favour of Lord Cranstoun, dated May 21, 1835, and said to
" be recorded in the books of Council and Session, on the 8th
" day of August, 1835.

" In the minute-book of deeds presented for registration, there
" is the following entry, under the date of August 8, 1835:—

" ' Dispn. by Lady Ashburton to Lord Cranstoun, 21st
" May, 1835.'

" And in the responde book of the office there is an entry
" under the date of August 11, 1835, which shows that an
" extract of the disposition in question was then given out.

" Among the receipts for writs delivered up or borrowed,
" contained in the responde book, there is the following:—

" ' *25th January,* 1836. Borrowed by me, W.S., principal
" ' disposition by the late Right Honourable Anne Selby, Lady

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" 'Ashburton, in favour of the Right Honourable James Lord
" 'Cranstoun, dated 21st May, 1835, and recorded 8th August,
" '1835. In the meantime I have deposited the Ex. with Mr.
" 'Peat.

(Signed) " 'AW. HOWDEN.'

" To this is annexed the following note:—

" '4*th February*, 1836. Prinl. returned to the record by
" 'A. H.'

" There is no subsequent entry in the minute-book of " *ingivings*; nor any entry in the responde book, to indicate " that any other, or different, extract had been given out by the " keeper; and the deed is entered on the record, as of the date " of the original presentment, on the 8th of August, 1835."

In consequence of suggestions by the parties, the deputy clerk register, at a subsequent period, made an additional report. To the suggestions of the appellant, he made the following answer:—

" 1. That second extracts are occasionally demanded by the " party ingiver of the original deed, as well as by other parties, " within the period of six months after the presentment of the " deed, and prior to its engrossment in the register; but in " such cases, if the original deed were demanded by the in- " giver, in the view either of being again returned and depo- " sited, or of being entirely withdrawn, the keepers would hold " themselves entitled and bound to withhold the deed until every " extract, whether in the hands of the ingiver or in those of " third parties, had been restored.

" 2. It is not consistent with the knowledge and experience " of the present keepers, nor is there any evidence on the books " of the office, that in any case where the original deed had " been borrowed by the ingiver, and not yet returned, a second " or other extract of that deed had been demanded or furnished " to any third party.

" 3. In any case where an original deed had been borrowed

" by the party ingiver, upon his receipt, and afterwards brought " back in a state varied in any respect from the tenor of the " first extract, the present keepers have no hesitation in stating " it as the rule of their bounden duty, that such altered deed " should be recorded anew, as of the date of this second pre- " sentment; and, independently of the case which has occa- " sioned the present inquiry, they are not aware, nor do the " books of the office afford evidence, of any deviation from the " rule now stated.

" 4, and 5. On the circumstances of the present case, the " present keepers can afford no explanation beyond what ap- " pears on the books of the office, as quoted in my former " report; but, on the facts assumed in these questions, there " has been a manifest violation of the rule by which the present " keepers hold themselves to be bound. Mr. Thomas Peat, " the principal keeper, by whom the extract, dated August " 8, 1835, was given, died in the month of September, " 1836."

And to the suggestion of the respondents, these answers:—

" 1. That agreeably to the uniform course of practice, the " deed in question originally presented for registration on the " 8th day of August, 1835, could not have been booked on the " 25th day of January, 1836, when the principal deed was bor- " rowed up, nor on the 4th day of February, 1836, when the " deed appears to have been returned, nor at any time prior to " the 8th day of that month, when the period of six months " from the date of its presentment terminated.

" 2. In all ordinary cases, even where a deed has been bor- " rowed and returned, it is recorded as of the date of the origi- " nal presentment; but, independently of what appears or is " alleged as to the circumstances of the present case, on which " I have nothing further to report, there is no evidence to be " found, on the books of the office, of any deed, borrowed, " altered, and returned, having been recorded on the date of its

" first presentment, and not on the day of its second present-
" ment, agreeably to the rule already stated.

" 3. I have been informed by the present keepers, that,
" within their knowledge, one or two instances have occurred,
" where a deed has been borrowed for a temporary purpose,
" and retained beyond the period of the six months from the
" date of presentment; and, in such cases, the record has been
" framed from the authenticated official extract left with the
" keepers until the original is returned."

The Court ordered minutes of debate to be laid before the other Judges of the Court for their opinion, which, upon advising these papers, was delivered in these terms:

" We are of opinion that it was competent for the parties who
" first sent the disposition libelled on to the register, to borrow
" or demand back the same within six months.

" It is indisputable in the practice of the register, that the
" enactment of the Act 1685, cap. 38, is still in force, in so
" far as it allows parties who have lodged writs for registration
" to get them back within a specified period. The report of
" the depute clerk register conclusively shows that that privi-
" lege has been acted on in many instances down to the present
" time.

" There is no doubt that this privilege is restrained by
" another special enactment in the statute, which provides, that
" ' no writ given in, shall be taken out, after the same is *booked*;'
" but we conceive that there was no room for the application of
" that prohibition in the present case. It only comprehended
" cases where the writs have been actually entered in the regis-
" ter book before they are demanded back. In such cases, the
" privilege of getting back the writ is taken away, probably to
" prevent any contradiction or discrepancy between the record
" and the principal writ, by alterations or additions which might
" be made, if the latter were lent up, after it had been engrossed
" *ad longum* in the record.

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" But we apprehend that the issuing of an ***extract***, or certi-
" fied copy of the deed before booking, is not sufficient to bring
" the case within the prohibition of the statute. Some incon-
" venience or hazard may indeed be found to arise from the
" issuing of such extracts, before actual registration; and if any
" evil is experienced, an appropriate remedy will be provided by
" the legislature, or by a general regulation to be made by the
" Court, as possessing a power of superintendence and control
" over the public records, in reference to future cases. In the
" meanwhile it rather appears that the custom of the keepers
" of the register, when a writ is demanded back within six
" months, to call in and get back, before returning the writ, all
" extract-copies which may have been issued since ingiving, is
" a precaution that may be sufficient to prevent any abuse from
" the practice now referred to. The report of the depute clerk
" register shows that the extract-copy first issued, was de-
" manded and given back in the present instance to the keeper,
" before the principal writ was returned. And, therefore, under
" all the circumstances of the case, we think that the inter-
" locutor of the Lord Ordinary on this point is well founded,
" and ought to be adhered to.

" J. CUNINGHAME.
" C. HOPE.
" AD. GILLIES.
" J. H. MACKENZIE.
" JOHN FULLERTON.
" F. JEFFREY.
" H. COCKBURN.
" JOHN A. MURRAY."

" I am of opinion, that it was competent, under the Statute
" 1685, c. 38, for the party ingiver, *to take up* the deed libelled
" from the register, at any time within the space of six months
" after its ingiving. But it appears to me, that this was com-

" petent only in the manner and under the circumstances pointed " out by the statute; and, consequently, that it was essential to " the regularity and validity of the proceeding, that the taking " up should be an absolute and definitive taking up, so as, from " the moment of its occurrence, to '*discharge the clerk of such* " '*writ*, just as if the same had never been registered.'

" I cannot regard the *borrowing* that took place in the pre- " sent case as a *taking up* of the deed in this statutory sense. " Neither the register nor the clerk was '*discharged of the writ*' " by such a borrowing. The receipt granted to the clerk, on " the contrary, implied an obligation to *return* the writ, as one, " which, *constructively* at least, was still *in manibus* of the clerk, " as a registered document. When the deed was returned, it " was accordingly dealt with by the clerk,—not as a deed given " in *of new* to the register,—but as a deed *already registered*, " and after a temporary borrowing, '*returned to the record*;' " the matter remaining upon the footing, and of the date, of the " original registration.

" Having this view of the case, I do not concur in Lord " Cuninghame's opinion, that it was competent for the parties " 'to borrow' the deed, 'and to return it *with the corrected* " '*testing clause* at the period that the disposition in the present " 'instance was returned.' It appears to me, on the contrary, " that any *alteration* upon the tenor of the disposition, while it " remained *borrowed up, on receipt*, was just as much a tamper- " ing with the integrity of the record, as if the party had " obtained access to the writ *in publica custodia* within the " register office, and had there effected the alteration. And, " therefore, as there is nothing, in my opinion, of which the " Court ought to entertain a greater jealousy, or which they " ought more readily or more anxiously to extend their arm to " prevent, than an attempt to interfere with the integrity of " written instruments, more especially while lying *in publica* " *custodia*, so I think it would be encouraging a dangerous

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" laxity, if, in the present instance, the party altering a deed, " while he holds it *borrowed up on receipt from the clerk register* " *or his deputies*, were to be allowed, directly or indirectly, to " take benefit from an alteration under such circumstances; or " were the Court to recognise or give effect to that alteration, as " if it were an innocent or authorized proceeding.

" Whether the pursuers,—had they, in terms of the statute, " got up the deed from the register, and so brought it once " more as a private document, under their own proper control, " —would have been justified in making the change upon the " testing clause, which they have made;—what ought to be the " legal effect of such change,—or whether the misnomer of the " witness, as originally written, would have been fatal, supposing " no change to have taken place;—are all of them questions " upon which, as I understand, no answer is now desired. But, " be the case in these respects as it may, I am humbly of " opinion, that the pursuers should, as matters now stand, be " kept to the shape of the deed as it existed, when presented for " registration on the 8th August, 1835.

" Besides, the summons libels the deed as 'a disposition " ' dated 21st May, and *recorded in the books of our Council and* " ' *Session, 8th August*, both in the year 1835;' and it is impos- " sible, I think, with reference to a libel so laid, to take into " consideration any other form of the deed, than what existed " at the date of recording thus libelled. The alteration upon " the testing clause which has given rise to the present discus- " sion, was confessedly not made till January 1836. And while " the settled practice, as reported by the depute clerk register, " is, that where a deed is got up from the register, and is after- " wards returned, ' varied in any respect from the tenor of the " ' extract,' the altered deed 'should be *recorded anew*, as of the " ' date of the second presentment,' there was here no registra- " tion of posterior date to 8th August, 1835, so as in this way " to meet the change effected on the tenor of the deed.

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" Upon the whole, there having been here—on the one " hand, by the private party, what I must consider an improper " tampering with a document belonging to, though, for the " moment, *borrowed out of the public records*,—and on the " other upon the part of the record keeper, what the deputy " clerk register expressly reports to be 'a manifest violation of " ' the rule by which the present keepers hold themselves to be " ' bound,'—I am of opinion that, *in the circumstances of this* " *case*, the deed libelled was not competently taken out of the " register, in the only sense recognised by the statute; that " the alteration made upon it, while *constructione juris* yet in " the register, must be wholly disregarded as an illegal pro- " ceeding; and, finally, that the deed must therefore be dealt " with, in the present discussion, as if no alteration had been " made, and as if it had stood at this moment precisely as it did " when originally given in for registration on 8th August, " 1835. J. IVORY."

Upon receiving these opinions, the Court, on the 20th July, 1841, adhered to the interlocutor of the Lord Ordinary.

The appeal was against these interlocutors, and two others not necessary to be noticed.

*Sir F. Kelly* and *Mr. Anderson* for the Appellant.—The disposition of 1835, as the testing clause stood originally, was altogether void. Archibald *v.* Marshall, *Mor.* 16907. Douglas and Co. *v.* Clerk, *Mor.* 16908. This, indeed, was assumed by the Judges below, who dealt only with the attempt to cure the defect in it. However regular the proceeding of borrowing up the deed from the record might have been, so far as the records were concerned, the alteration of the deed after the death of the granter, was altogether incompetent. In the Bank of Scotland *v.* Telfer's Creditors, *Mor.* 1690, an objection, that the testing clause had been added to, was

repelled no doubt; but there the addition, although made after the bankruptcy of the granter, was at least done in his lifetime; and in Dick *v.* Dick, *Hume's Rep.* 908, an objection to the filling in of a testing clause, after the death of the granter, was repelled; but there the objection was not to any alteration upon the deed, after it had been once completed, but to the insertion of the entire testing clause in a space which had been left for it by the maker of the deed. These cases, therefore, are both distinguishable from the present in their circumstances, and, moreover, in this other respect, that in neither of them had the deed either been recorded or presented for registration.

If the deed was void at the death of the granter, nothing that was done after that event could alter its condition. The lands then vested in the appellant as the heir-at-law of Lady Ashburton, and nothing done afterwards could divest them, still less anything done by the grantee in the deed. For anything known, the granter may intentionally have allowed the deed to remain with the error in the testing clause uncorrected, and any evidence *dehors* the deed itself to prove the contrary, is altogether inadmissible. Cleland *v.* Cleland, 1 *B.* & *M.* 254.

But if the deed could be altered after the death of the granter, it could not be so after it had been recorded; and it was recorded, so soon as the keeper had issued an extract. Thenceforth, whatever may have been the practice of the office, it was incompetent for the keeper to deliver it out again. Registration is voluntary; and the Statute 1685 allows the party giving in the deed for registration, to alter his mind, and withdraw the deed altogether, at any time, within six months, so long as the deed has not actually entered the record: but it in no way sanctions the notion of the deed being borrowed up in order to its being altered—it may be in order to its being vitiated—and being then returned for recording as was done in this case. If that practice were to be sanctioned, it is difficult to conceive the consequences; in the present case, the extract

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upon which the action is founded, bears, that the deed was given in to be recorded on the 8th August, and the extract, with this statement, contains the alteration of the testing clause, which, according to the very case made by the party, had not been effected until the month of January following.

In another view, however competently the alteration might have been made after the death of the granter, or after registration, it amounted to an alteration *in substantialibus*, and so vitiated the deed, *Stair* IV. 42. 19; Walker *v.* Gibson, 2 *Dow.* 270, where the vitiation was the writing of the instrumentary witness's name upon an erasure.

II. The deed of 1826 was, for onerous causes, and in its nature irrevocable. Not only did Macdonald dispense with any tocher, but he renounced his *jus mariti* and right of curtesy; and in consideration of this, it was agreed that the estate should be settled on the issue of the marriage, "and other ways." It is not denied, that if there had been issue of the marriage, the deed would have been irrevocable. It is only because the marriage was dissolved, without issue, that it has been supposed to be revocable, but in its terms it is not confined to the duration of the marriage. It makes provision for the event of the dissolution by the death of either of the parties, by a continuance of its operation in the form of a strict entail upon substitutes beyond the issue of the marriage. The non-existence of issue, and the dissolution of the marriage, cannot alter the nature of the deed from onerous to gratuitous; the only effect is to advance the rights of those ultimately entitled to take. The settlement having been made before marriage, the substitutions are effectual beyond the immediate subjects of the marriage, and cannot be defeated, according to a rule established in England, and recognized in Scotland. Goring *v.* Nash, 3 *Atk.* 188, note to Sanders' edit.

The deed, which is one *inter vivos*, divests the granter of her estate, and while it reserves to her an equivalent to a liferent in

the enjoyment of the rents and profits, puts a restraint even upon that enjoyment, by prohibiting sale, mortgage, or anticipation, and binds the granter in absolute warrandice of the conveyance effected by it; and in that view, though it were held not to be onerous, it would be irrevocable after delivery to the trustees, *Ersk.* III. 3. 91, Grant *v.* Grant, *Mor.* 3596, there, a conveyance, *inter vivos*, in favour of a brother, upon failure of issue, was sustained as irrevocable: and in Warnoch *v.* Murdoch, *Mor.* 7730, an annuity given by a contract of marriage to the stepmother of the husband, was sustained as irrevocable; and Braidwood *v.* Braidwood, 13 *S. & D.* 449, and 14 *S. & D.* 64, is a similar illustration of the irrevocable nature of a deed *inter vivos*, having a clause of absolute warrandice.

Moreover, so soon as the lands purchased under the deed of 1826 were vested in trustees, they were withdrawn from the power of the granter until the purposes of the trust were answered, which they are not, while the remote substitutions, after the issue of the marriage, are unsatisfied, Turnbull *v.* Tawse, 1 *Wil. & Sh.* 80; Spence *v.* Ross, 3 *Wil. & Sh.* 380; and Smitton *v.* Todd, 2 *Bell & Mur.* 225. Not only so, but the trustees were required to entail the lands strictly upon the series of substitutes pointed out. As this ought to have been done by the trustees, it must be held as having been done; and had it been done, it would not have been in the power of the granter to do anything whereby the rights of the substitutes could be injured or defeated. Schaw *v.* Schaw, *Robertson's App.* p. 203; Gordon *v.* Dewar, *Mor.* 15579.

III. Not only was the deed of 1826, from its nature and terms, irrevocable, but no right of property was ever vested in Lady Ashburton, which could entitle her to execute the disposition of 1835. If the lands had been vested in her, a disposition with a final substitution in favour of "her heirs," might have given her the fee absolute on failure of the prior substitutions;

but where the lands had never been vested in her, and she was not one of the members of substitution, the final substitution to "her heirs," and more especially to her "nearest "heirs-at-law," is merely designative of the persons to take, not of the character in which they take, 1 *Fount.* 586, and cannot imply any reverting fee in her. The interposition of the trust under which the fee was to remain in the trustees, they paying her the rents and profits until her death, when the entail was to take effect, more especially precluded any notion of this kind. Even in England, where the law is less favourable than the law of Scotland is, to conditional institution, ultimate limitations by marriage-settlement have been held to give a right which is not defeasible by the settler, Anderson *v.* Dawson, 15 *Ves.* 532; Baines *v.* Ottey, 1 *My. & K.* 465. Here, the appellant, under the destination to the "*nearest heirs-at-*"*law,*" was entitled, on failure of the prior links in the destination, to take as conditional institute. If Lady Ashburton was not absolute owner of the lands otherwise, she was not the more so, that she had, by the deed of 1826, a power of appointment, even although the possession of the power was accompanied by the enjoyment of a life estate. Mere possession of a power is not equivalent to possession coupled with an exercise of the power. It must be exercised in order to confer any right upon the holder of the power, or those claiming under him. Hepburn *v.* Bruce, 2 *Bro. Supp.* 15; Mc Lean *v.* Mc Lean, 5 *Bro. Supp.* 44; Reid *v.* Shergold, 10 *Vesey,* 369. Moreover, her power in the present case was of a limited nature, to be exercised as a sort of rider upon the entail to be executed by the trustees; and its very existence is opposed to the notion of any absolute right of property resulting to Lady Ashburton, on failure of issue of the marriage, and establishes that a conditional institution of her "nearest heirs-at-law" was intended; for how, on the supposition of her obtaining an absolute right upon such failure, could it have been necessary to confer upon

her any power whatever, which was not implied in such absolute right.

IV. If the deed of 1826 was revocable, it has not in fact been revoked. The deed of 1835 is confessedly, by the terms of the summons, not sufficient *per se* to operate a conveyance of Arisaig, without a conveyance from the trustees; it would be wholly inoperative, in the events that have happened; but such a conveyance was not contemplated or intended by Lady Ashburton. Instead of revoking the deed of 1826, she intended it to remain as the title of a conveyance from the trustees to her, which in its turn should support her deed of 1835, in favour of the respondent, a deed which she had granted as "heritable "proprietrix;" but until she obtained that conveyance from the trustees in her own favour, her conveyance to the respondent, though clearly enough expressed in intention perhaps, was not completed in act.

V. The deed of 1835 was neither in form nor effect an exercise of the power reserved by the deed of 1826. That power was to name or appoint persons or uses under the entail, to be executed by the trustees, and that by deed of settlement or other writing, to be executed during the subsistence of the marriage, or after its dissolution, by the death of Macdonald. The persons or the uses, therefore, were to be subject to the entail; but the deed of 1835 is not a nomination at all, either of persons or uses; it is a conveyance in fee-simple absolute; and it was not executed, either during the subsistence of the marriage, or after its dissolution by the death of Macdonald, but after its dissolution by his divorce. It neither refers to the power, a reference which can be dispensed with only when the form of exercise prescribed has been observed; nor does it observe that form. But in order to make a deed in exercise of a power effectual, it is indispensable that every requisite prescribed by the power be minutely observed. Breadalbane's Trustees *v.* Breadalbane, 2 *D. B.* & *M.* 915: Borthwick *v.* Hos-

pital, *Mor.* 4095; Hawkins *v.* Kemp, 3 *East*, 410. In the absence of either a reference to the power, or observance of the forms prescribed by it, it is impossible to say that Lady Ashburton had the power in her mind, at the time she executed the deed of 1835.

*The Lord Advocate, Mr. Turner,* and *Mr. G. L. Russell,* for the Respondent.—I. The Statute 1685 requires that a deed given in to be registered shall be booked within a year after, but it allows the party giving it in, the privilege of withdrawing it at any time within six months after "its ingiving," under the limitation that no writ "given in shall be taken out after "the same is booked." It is ascertained by the keepers of the register, that in the present instance the deed was taken out within the six months, and that at the time it was given out, it had not been entered in the books of the register. What was done, therefore, was within the provisions of the statute. With regard to the constructive registration contended for by the appellant, in the fact of an extract having been given out as if the deed had been recorded, there is no authority in the statute for it; and if it were adopted, the effect would be to nullify the registration of all the deeds which have been given out in this way, and which, according to the report of the keeper of the register, are very numerous. Though it be true that the extract, issued after the deed had been returned, should have borne a new date of presentment, that will not vitiate the deed itself, which remains unaffected.

If the proceedings in regard to the taking of the deed out of the record was regular, there was nothing in the error in the instrumentary witness' name to affect the validity of the deed. In Stewart *v.* Stewart, the instrumentary witnesses signed by the names of "Moir" and "Garrock," but in the testing clause their names were filled in as "Moor" and "Garvock," *o* being substituted in the one case for *i*, and in the other *v* for *r*; dis-

crepancies fully as serious as that which occurred here, and yet an objection to the validity of the deed was overruled. But even if the objection to the testing clause, as it stood originally, were well founded, nothing is better established in the law and practice of Scotland than that the testing clause of a deed may be filled in at any time before the deed is produced in judgment. It was as competent, therefore, to make the addition to the testing clause, as it was to fill in the clause itself.

II. The deed of 1826 was no further onerous than as regarded the issue of the marriage between Lady Ashburton and Macdonald. The interests of the contracting parties and of their issue by the marriage, were the only objects contemplated by it, and so soon as the marriage was dissolved by the divorce of Macdonald without issue of the marriage having been born, the objects of the settlement were at an end. Anderson *v.* Buchanan, 15 *S. & D.* 1073. Craigie *v.* Gordon, 15 *S. & D.* 1157. This being the case, Lady Ashburton by the divorce was restored to all the rights of an unmarried woman, and had full power to re-settle the lands in any way she might feel disposed.

III. But even if this were doubtful, the deed of 1826 gave her ladyship express power, failing issue of the marriage—an event which happened—to appoint the lands to such persons and upon such uses as she might select. The disposition of 1835, though not in form or by reference, an execution of that power, is nevertheless effectual for that purpose, if allowed its own natural operation; and that, by the law of Scotland, is all that is required in order to the execution of a power. It is not necessary, in order to the effectual execution of a power, either that the deed should refer to the power, or that it should be shown that the maker had the power in view;—it is sufficient if the deed giving it its ordinary legal effect, will work an execution. Cameron *v.* Mackie, 7 *Wil. & Sh.* 106.

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Even adopting the stricter principles of the law of England upon this subject, there is sufficient upon the face of the disposition of 1835, to make it an execution of the power in the deed of 1826, for it conveys by name the lands which are the subject of the power and cannot take effect without executing the power.

LORD BROUGHAM.—My Lords, this case gave rise to several questions, one of which, originally, occupied a good deal of your lordships' attention at the hearing of the argument at the bar; the other two points were more argued by the respondent than by the appellant, the respondent having been told to confine himself mainly to those other two points. The first of those points, but that which ultimately gave rise to more difficulty in the minds of your lordships who heard the cause, and gave rise also to some communication, through me, with the learned Judges below, as to the practice, was touching the regularity of the testing clause, in which a material alteration had been made for the purpose of curing an otherwise fatal defect in the name of one of the witnesses, an "r" being substituted instead of an "n," *Crammord* instead of *Crammond*, which is most material in writs, which prove themselves according to the Scotch law, being probative writs, in which everything depends upon the perfect accuracy of the testing clause. This correction of an otherwise fatal error, had been made subsequently to the deposit of the deed in the register office, but within six months. It was then got out, and much question arose as to the practice there; and the Court of Session very properly, and very judiciously, in my humble opinion, took the course of remitting to Mr. Thomson, the experienced and learned deputy clerk register, who made a full and ample report upon the subject, containing a variety of precedents and cases, and containing also, his opinion of the practice.

Upon this statement, upon the communication which we

have had with the learned Judges, we have the opinion of those learned Judges, all of whom, with one exception, I think, (a most respectable exception, no doubt,) Lord Ivory; all the others, including the Lord President, the late Lord Justice Clerk, the now Lord President, and Lord Jeffrey, gave a very clear opinion, that this is by no means inconsistent with the practice of the Scottish register office; that the error is, therefore, by no means a fatal one, and, consequently, the argument on this ground on the part of the appellant entirely fails.

It would have required a very much stronger exception than that respectable authority of Lord Ivory furnishes. It would have required a much stronger view of the case than we have been able to take. It would have required a much greater weight of argument, as well as of authority, upon a question which is one fully as much of practice as of principle, to have entitled your lordships, in the face of the all but unanimous opinion of those learned persons presiding in that Court, including in the majority one of the most eminent conveyancers on that bench. It would have required, I say, a much greater weight of authority, and stronger force of argument, than has been urged against this decision, to have entitled your lordships, in the face of that weight of authority, upon a point of practice as much as of principle of the law of conveyancing in Scotland, to have decided in favour of the appellant and against the respondent.

Then, my Lords, the other points which have not occupied so much of our attention, were argued chiefly by the respondent at the bar, whom we had absolved from the argument of the other point. The other points related to two matters. The first was, whether there was a power in the deed of 1826, under which Lady Ashburton could make the settlement on behalf of the present Lord Cranstoun; and, secondly, whether that power had been executed by her.

With respect to the first of those, I am clearly of the

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opinion at which Lord Jeffrey arrived, the Lord Ordinary in the cause, and which he has very fully explained, and I think very successfully defended, both by argument and also by authority, in reasoning upon the case, and setting forth his view of its peculiar circumstances. With that opinion, and upon those grounds, I am entirely disposed to concur.

There was a case referred to by Lord Jeffrey, (Turnbull *v.* Tawse,) and which I recollect very well in this House. It was decided by Lord Gifford, (sitting here in 1823 with Lord Eldon,) the then Master of the Rolls and Speaker of this House for the time being, reversing the decision of the Court of Session. My Lords, I do not go along—and it is principally for that reason I mention that I cannot go along—with an observation of Lord Jeffrey; and it is the only part of the learned and able note, (as everything that comes from him is sure to be learned and able,) that I do not go along with. It is an observation in which he objects to, or casts some doubt upon, the justice of that decision in this House. His lordship is pleased to say, that he cannot help entertaining doubts of the soundness of the views on which that reversal seems to have proceeded. Now that is very possible—my Lord Jeffrey may entertain, if he chooses, those doubts—but he goes on to say, that he is far from feeling any assurance that the Court, (that is, the Court of Session,) would hold themselves bound by its authority in any similar case.

Now a Judge in the Court below may well entertain doubts of the soundness of a judgment in the Court above, reversing his decision. We allow him the full benefit of those doubts, but he must not act upon those doubts. He may say that it is only *simile* not *idem;* but he says he is far from feeling any assurance that the Court of Session would hold themselves bound by the authority of the House of Lords in any similar case. My Lords, I feel a very confident assurance on the part of the Court of Session, as well as of this House, that they

would feel themselves bound entirely, and that that decision would be found to be a governing principle with them in a similar case, unless there were circumstances so different as to make it have no application—then, of course, it would not be a similar case.

But although I differ in that respect from Lord Jeffrey, I entirely agree with him when he goes on to say that there is no similarity or application whatever of the case of Turnbull *v.* Tawse, to the present case; and if I were to choose words in which to state my opinion of the dissimilarity of the two cases, and therefore of the non-application of that case of Turnbull *v.* Tawse, which I hold to be law and without doubt, (there alone differing from Lord Jeffrey,) if I were required to find words to express that difference, I should take Lord Jeffrey's own most clear, and lucid, and accurate statement of the difference. "In that situation," he says, "and in implement of this natural "and legal obligation, the mother conveys the fee of certain "properties to trustees for them, (then all existing and severally "named in the settlement,) under the single burden of certain "specific and limited debts, and upon this conveyance the "trustees are infeft, for behoof (in so far as concerned the fee) "of the said children, exclusively and without any reservation "on her part of power, either to revoke or alter generally or to "interpose other 'persons or purposes' between them and the "fee so ultimately destined. In the present case, on the other "hand, the destination on which the defender," (that is, Lord Cranstoun,) "relies, is, neither to a child or descendant of the "granter, nor to any one having any natural or legal claim upon "her; nor, finally, to any one definite person known or con-"templated at the time as an existing individual, but merely "in the most general terms, and *ultimo loco* in the event of "no special disposition being made, to whomever might happen "in that event to hold the character of her nearest heir-at-law." And then observe what follows, and then there is besides,

which as my Lord Jeffrey most justly observes, "is *per se* "decisive, the most distinct reservation of power," (which there was not in that case of Turnbull *v.* Tawse at all,) "on the failure "of issue of the marriage," (which here must fail, because the marriage has been dissolved by Act of Parliament or by sentence of divorce,) "to destine the property to any persons or purposes "she might choose to specify by any writing under her hand." I therefore wholly agree in the conclusion, which immediately follows, of my Lord Jeffrey, that "it is impossible, therefore, to "conceive a case in all its essential particulars, more unlike to "that of Turnbull *v.* Tawse."

My Lords, the next point, and the only one that remains to deal with is, whether or not there has been an execution of the power. Now it is not necessary by the law of Scotland in executing a power or a reserved faculty, (what we call a power here,) that reference should be made in the instrument purporting to execute that power, to the instrument creating the power. It is not even necessary in the law of England that there should be in the instrument executing the power a direct and specific reference to the power, or a statement by the donee of the power, armed with it and assuming to execute it, that he does this act in execution of the power. But the law of Scotland materially differs from the law of England in this respect. It is rather contrary in its principle, than similar to the law of England. In the law of England, I, who set up an execution of a power by a certain act done, am bound to show that the act was done in execution of the power, though I am not bound to show it in that particular way of proving it by a direct reference to the instrument creating the power in the act executing the power. But in the law of Scotland it is rather the reverse; the proof is thrown upon the other side. It shall be held to be an execution of the power, unless it appears not to be an execution of the power. So entirely different are the principles in this respect upon which the two systems of juris-

prudence proceed. But in the law of England, as I said before, it is not necessary by any means, that A. B., the donee of the power, in doing any act upon which the question arises,—is or is not this act an execution of a given power of which A. B. was the donee?—it is not necessary that the party setting up the act as an execution of the power, shall show that A. B., the donee, referred to the power and said, I do this in execution of the power in me vested by such and such a deed, settlement, or will. No such thing; it must be clear, and he is bound to show it, that it is in execution of the power; but he is not bound to show it by a reference from the instrument executing the power to the instrument creating it. I laid that down very clearly, in the case of Cameron *v.* Mackie, in the year 1833, 7 *Wil. & Sh.* 106, in which this question arose. I referred to the case of Andrews *v.* Emmot, which is a leading case in 2nd *Brown's Chancery Cases*, in Lord Thurlow's time, and to the case of Hales *v.* Margerum, which is in 3rd *Vesey*, junior; that was a decision of Lord Alvanley; and it is there held that if a man disposes of that over which he has a power in such a manner (though without referring to it,) that it is impossible to impute to him any other intention but that of executing the power, the act done shall be an execution of the power. And that is common sense. The internal evidence of the case may show that though no reference whatever is in terms made to the power, yet that it is an execution of the power. Lord Alvanley, in Hales *v.* Margerum, comments upon the decision in Andrews *v.* Emmot, and he says "there must be either a direct "reference to it or a clear reference to the subject of it, or some-"thing upon the face of the will, or independently of it, some cir-"cumstances," (by which I must understand his lordship to mean not some fact out of the instrument, which is a different case,) "some circumstances which show that the testator could not "have made that disposition without having intended to com-"prehend the subject of his power." That is the law here.

Now, even according to this principle of the law of England, if you apply even this principle, which is, as I said before, totally different in this respect from the law of Scotland, which throws the proof upon the party denying, whereas here it is thrown upon the party affirming and setting up the execution, you will find that there is in this case, as has been most justly argued on behalf of the respondent, quite sufficient to have brought the case within the principle even of the English law, with respect to the execution of the power. My Lords, in this case it is quite clear, from the nature of the instrument itself, that this was and could not be other than an execution of the power.

My Lords, upon these grounds, therefore, I entirely go along with the decision of the Court below. It was very fit that time should be taken to consider, especially the first matter respecting the testing clause. I am clearly of opinion, that that decision is well founded; and that with this single exception of the doubts cast upon the judgment of this House in 1823, in Turnbull *v.* Tawse—with which doubts I do not at all concur—with that single exception, the case has been most fully and satisfactorily argued in the judgment of Lord Jeffrey, to which the Court of Session entirely adhered. The only point which seems to have been referred to the consulted Judges, was that with respect to the testing clause. The other points appear never to have raised any doubt whatever in their lordships' mind; for all the Judges, except Lord Ivory, agreed in the judgment.

LORD CHANCELLOR.—My Lords, the only doubt which I entertained at the time this case was argued, was as to the effect of the manner in which the deed of 21st May, 1835, had been dealt with, after it had been presented for registration, on the 8th August, 1835. But upon consideration of the provisions of the Act of 1685, and the practice which has prevailed under it, I concur in the judgment of the Court of Session, that

the deed cannot be impeached upon any of the grounds suggested. The rights of the parties are therefore to be considered upon this deed as it now stands, together with the trust-disposition of 29th June, 1826.

The title against which the appellant contends, is founded upon a disposition by Lady Ashburton, dated 21st May, 1835, by which, describing herself as heritable proprietrix of the lands after mentioned, (being the estate of Arisaig in question in this cause,) she gave, granted, alienated, and disponed, conveyed and made over from her, and her heirs-at-law, and her successors whatsoever, to and in favour of Lord Cranstoun, his heirs and assigns whomsoever, heritably and irredeemably, the lands in question, by name, together with all right, title, interest, claim of right, property and possession, petitory or possessory, which she had, or could pretend thereto. The only question which could arise upon this instrument would be, first:—Had Lady Ashburton the power of disposition over the lands in question? and secondly:—Was the instrument in question capable of passing to Lord Cranstoun the interest in the property which it was Lady Ashburton's wish to bestow upon him. This must depend upon the provisions of the marriage-settlement of Lady Ashburton, dated 29th June, 1826, by which the trustees were authorized and directed to purchase with certain trust-funds the lands in question, and to procure themselves to be feudally invested in such lands, and thereupon, after providing for the payment of the income to her for life, to execute a deed or deeds of strict entail, disponing and conveying the same after her decease, but always under and subject to all clauses, prohibitory, irritant and resolutive, necessary and accustomed by the law of Scotland, for constituting a perfect entail, to and in favour of the children of the marriage, male and female, and failing such issue, "to "such person or persons, or to such uses and purposes as shall "be named and appointed by me, in any deed of settlement or "other writing, to be executed by me, either during the sub-

" sistence of my intended marriage, or after its dissolution by " the decease of my intended husband, whom all failing to my " own nearest heirs-at-law."

The appellant is the heir-at-law, who contends that such estate and interest as by this deed was reserved to the disposal of Lady Ashburton in the event of there being no children of the marriage, was not effectually given to Lord Cranstoun by the disposition of 21st May, 1835. The ingenuity which has been exercised in support of this proposition has totally failed in raising any doubt in my mind. The entail to be created was, I think, confined to the issue of the marriage, upon failure of which the dominion over the property as to *persons, uses and purposes*, was to belong without restriction to Lady Ashburton, and upon failure of all persons so to be named by her, the property was to go to her own nearest heirs-at-law. There being a failure of issue of the marriage, Lady Ashburton by the deed of 21st May, 1835, has given this property to Lord Cranstoun, his heirs and assigns whomsoever. The property was in trustees, but the beneficial interest was in Lady Ashburton; and why is not her disposition competent to pass it to Lord Cranstoun? She had reserved to herself a power of appointment to the property, but in default of appointment it was to go to her heir-at-law. The deed of 21st May, 1835, was quite sufficient to execute the power, because in Scotland it is not necessary that the power should be referred to, and the property is named. If she had no estate or interest, but only a power, then clearly the power was well executed, and if she had a disposable estate and interest, then the deed was sufficient to pass it; and because the deed might operate either way, an argument was raised that it did not operate in any way.

There does not appear to be any ground for the argument, that by the law of Scotland, such an ultimate destination as this to the heir-at-law of the truster, gives an interest to whomsoever may answer that description, which the truster cannot defeat

by a disposition to another. And this disposes of another objection, that the marriage having been dissolved by divorce and not by death, the power could not be executed during the life of the husband. Looking to the power itself only, the objection could not, I think, be maintained. I am therefore of opinion that the interlocutor appealed from should be affirmed with costs.

LORD CAMPBELL.—My Lords, I entirely agree with my two noble and learned friends who have preceded me, in the view which they have taken of this case, and I do not think it necessary to detain your lordships for more than a moment.

The only question upon which I entertained any doubt, was respecting the testing clause. As to the others, I really think that they were hardly arguable.

With respect to the execution of the power, though, according to the law of England, it must appear from the deed, which is said to be an execution of the power, that it is an execution of the power, and that the donee of the power had the power in his mind at the time he executed it, by the law of Scotland it is quite enough that the power would authorize the act that is done; and it would be wholly immaterial if it were to appear, in the most satisfactory manner, that the donee of the power had not the power at all in his recollection, and was acting under some other supposed authority.

With respect to the testing clause I must own I was very much shaken indeed by the argument we heard, because, looking at the Statute of 1685, it is very difficult to say that this mode of proceeding, if it were *res integra*, would be justified by it. But when, upon inquiry, we find that it is the invariable and unquestionable practice in Scotland so to alter the testing clause in a deed, and that it has been so far back as can be traced, to hold that the execution of the deed has failed, on account of a supposed irregularity, would lead to most mis-

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chievous consequences. Upon such a point, I think that usage, even in the very teeth of the Act of Parliament, must be considered as entirely decisive.

Now, not only from the inquiries that were made during the argument, but by inquiries instituted very properly by my noble and learned friend who sits by me, after the argument closed, it appears that this has been the invariable, constant, and unquestioned usage in Scotland.

I am, therefore, clearly of opinion that validity cannot be given to this objection. That is the only point which I ever entertained any doubt upon, and I, therefore, entirely concur in the opinion that this interlocutor should be affirmed.

It is ordered and adjudged, That the said petition and appeal be, and is hereby, dismissed this House, and that the said interlocutors therein complained of be, and the same are, hereby affirmed. And it is further ordered, That the appellant do pay, or cause to be paid, to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby, remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs, as shall be lawful and necessary.

G. and T. W. WEBSTER—WARRY, Agents.

[13*th August*, 1846.]

ARTHUR J. ROBERTSON, Esq., of Inches, *Appellant.*

RICHARD PATTINSON, Esq., and Mandatory, *Respondents.*

*Diligence—Evidence.*—Where a purchaser of property under a deed of sale and conveyance, averred in general terms, that an understanding or agreement had existed, which created a variation in regard to the price of the purchase, from the terms contained in the deed, and asked a diligence for recovery of all possible documents, to prove this understanding or agreement, *held*, that the Court exercised a sound discretion, in requiring the party to describe, by date or otherwise, any document he averred to exist in support of his averment, and in refusing the diligence when he failed to do so.

*Sale.*—Where a purchase, generally without specification, of an heir's whole interest in the estate real and personal of a testator, was made and carried out by a deed reciting that the accounts and particulars of the estate had been examined by the purchaser, it was *held*, that no inquiry could be gone into, in regard to portions of the real estate having been previously sold by trustees in the management of the estate, for the general purposes of such management, whereby the land was reduced as alleged, below what the purchaser had expected, the purchase not having been of any ascertained quantity.

THE respondent was the son of Richard Pattinson, deceased, by a second marriage the only issue of which were the respondent and one sister. The appellant was the husband of the deceased's only child by his first marriage. The deceased was possessed of considerable personal property, and of real estate in the two provinces of Canada. At his death he left a will, giving the respondent the option of taking his whole estate under burden of a provision for his two daughters, or of dividing it equally with them. The respondent, who was a minor at the

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time of his father's death, attained majority in the year 1830. Shortly afterwards he elected to take an equal share of his father's estate with his sisters, and agreed to sell to the appellant, his brother-in-law, his share for the sum of 5000*l.*, under a power for redemption at any time within two years.

In the course of the two years, after a little more was known by the parties of the value of the estate, instead of the respondent exercising the power of redemption, a new arrangement was entered into, by which the appellant agreed to pay him 8000*l.* as the price of his share: this was reduced to writing by a deed, dated 20th April, 1832, duly executed, which, after reciting the will of the deceased, and the devise thereby to trustees, continued thus:—"And whereas the said trustees "lately rendered to the parties interested in the said estate, full "accounts of their intromissions therewith, together with sche- "dules and estimates thereof: and whereas the said Richard "Pattinson having, after a full examination of the said accounts, "schedules, and estimates, come to the determination of declin- "ing to take under the said will, on the conditions therein "expressed, the testator's said estate falls to be equally divided "among his said children in terms of the said will: and whereas "it appears from the said estimates, that the value of the share "of the said estate falling to the said Richard Pattinson consi- "derably exceeds the said sum of 5000*l.*; and the said Arthur "John Robertson has therefore agreed to allow and pay unto "the said Richard Pattinson the further sum of 3000*l.* money "foresaid, as the balance of the value of his said share: and "whereas one-third part of the said estate falls and belongs to "the said Arthur John Robertson in right of the said Mary "Ann Pattinson, his wife: and whereas the said Arthur John "Robertson has settled with the said Ellen Phyllis Pattinson, "for her one-third share of the said estate. Now this indenture "witnesseth, that in consideration of the said additional sum of "3000*l.* of lawful money of Great Britain to the said Richard

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" Pattinson in hand, well and truly paid by the said Arthur " John Robertson, at or immediately before the sealing and " delivery of these presents,—the receipt whereof the said " Pattinson doth hereby acknowledge; he, the said Richard " Pattinson, hath granted, bargained, sold, assigned, transferred, " and set over, and by these presents doth, without hurt or pre- " judice to the foresaid indenture or deed of conveyance, assign- " ment, and transfer, but in corroboration and confirmation " thereof, of new grant, bargain, sell, assign, transfer, and set " over unto the said Arthur John Robertson, his heirs, executors, " administrators, and assigns, all and singular the estate, both " real and personal, wheresoever situated, goods, chattels, and " effects, which pertained to the said Richard Pattinson his " father, so far as he has right thereto by virtue of the said will " or otherwise, as the heir-at-law, and one of the nearest of kin " of his said father, and all interest, benefit, and advantage " which he has, or can claim, in and from the estate and succes- " sion of his said father in any manner of way howsoever, toge- " ther with the rents, income, and profits of the said estate, so " far as he has right thereto: to have and to hold the said real " estate, with its appurtenances, and the rents, profits, and pro- " duce thereof, unto the said Arthur John Robertson, and his " heirs and assigns for ever; and the said personal estate, with " the profits and produce thereof, unto him, his executors, " administrators, and assigns, for ever, to the only proper use " and behoof of him, the said Arthur John Robertson, and his " heirs, executors, and administrators and assigns for ever: and " the said Richard Pattinson, for himself, his heirs, executors, " and administrators, doth covenant, promise, grant, and agree, " to and with the said Arthur John Robertson, his heirs, execu- " tors, administrators and assigns, that he, the said Richard Pat- " tinson, hath not, at any time or times heretofore, done, com- " mitted, or suffered any act, deed, matter, or thing howsoever, " whereby, or by means whereof, the aforesaid estate, real or

" personal, is or shall be impeached, charged, or incumbered, in " any way howsoever."

After the execution of this deed, if not previously, the appellant corresponded with and visited the trustees in Canada, in regard to the management and winding up of the deceased's estate.

Neither the 5000*l.*, the price of the original sale, nor the 3000*l.*, the additional price of the second sale, were paid at the period of the respective sales; but on the occasion of the second sale, the appellant gave the respondent his promissory note for 7000*l.*, and afterwards he treated the debt thus constituted against him as a fund of credit for the respondent, by honouring the drafts of the respondent upon him, and paying monies on his account. In the month of June, 1832, the parties adjusted accounts, which were docqueted by the appellant in these terms:—" And I declare that all accounts betwixt " the said Richard Pattinson and me, at and preceding the said " 20th day of April, 1832, are finally settled, (with the excep- " tion of 127*l.* 8*s.* 9*d.*, due to Mr. Shepperd,) I having granted " him my note for 7000*l.*, of that date."

On the 15th May, 1833, the parties again adjusted an account which set out with the 7000*l.* contained in the promissory note, and was balanced by 5000*l.* in favour of the respondent, after deducting payments by the appellant on his account. For this sum of 5000*l.*, the appellant gave the respondent his promissory note. This second account was docqueted in these terms:—" The above account is this day settled, and Inches" (the appellant) "has granted his promissory note at twelve " months' date, for the balance of 5000*l.* arising thereon, the " said note being payable to Mr. Pattinson."

At this period the respondent quitted England for military service in India; and the estate, as thitherto, was thenceforth managed by the appellant.

In the month of October, 1842, the respondent brought an

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action against the appellant for payment of 3,925*l.* 11*s.* 4*d.*, as the balance owing upon the promissory note for 5000*l.*, after deducting a variety of payments made to the respondent, by the appellant, between the years 1833 and 1842, two of the payments, one of 500*l.* and the other of 300*l.* being marked on the note. The appellant, in his defence to this action, made the following statement in regard to the second sale:—"The pursuer "subsequently availed himself of that power, and a new transac- "tion was entered into between the parties, whereby the *nomi-* "*nal* price was fixed at 8000*l.*, being 3000*l.* in addition to what "had been previously agreed upon. But as it was known that "this would give the pursuer 1000*l.* more by his father's suc- "cession than either of his two sisters (whose shares, it was "ascertained, would not exceed 7000*l.*), it was expressly agreed "upon, and formed part of the contract, that though the price "was nominally fixed at 8000*l.*, yet as the defender had never "seen the property, and had no proper knowledge of its real "value, no more should be exacted from him than 7000*l.*, in "the event of his being dissatisfied with the property, or of his "being a loser by becoming the purchaser of the pursuer's "share. In that event, the whole members of the family were "to be placed upon a footing of equality. It was further agreed, "that, unless for the purpose of procuring a commission in the "army, and for defraying his outfit, the pursuer was not to "exact payment of the capital, but was to allow it to remain in "the defender's hands until he should sell, or otherwise dispose "of, the Canadian property to advantage. On the other hand, "the defender agreed to pay the interest to the pursuer for his "support." This statement he followed up by another, that he had not been enabled to dispose of the Canadian property to advantage, and had been a loser by the bargain with the appellant. Upon these grounds, he insisted that on a final adjustment of the account, he would be entitled to a deduction of 1000*l.* from the price of the respondent's share.

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The appellant's defence to the action was rested upon this statement; but in a statement of facts made by him in the course of preparing the record, he introduced this new statement:—

"On reaching Canada, the defender, (appellant,) discovered "that a large and valuable section of land contained in the "schedules and conveyance before mentioned, and amounting "to upwards of 1600 acres, had been sold in payment of taxes "due from the estate. Farther, the defender found that the "pursuer's father had laid himself under an obligation to grant "a title in favour of a person of the name of Connar to another "section of land situated in the United States, and which was "likewise represented to the defender as forming part of the "estate purchased by him; and the defender was himself under "the necessity of executing a conveyance of said section, in "implement of the late Mr. Pattinson's obligation. He farther "discovered that another section of land, consisting of about "100 acres, and situated in the London District, Township of "Blenheim, and contained in said schedules, and forming part "of his purchase, had likewise been sold in payment of taxes. "Moreover, in the Eastern District, another small portion of "land had been disposed of in payment of taxes, and which the "defender afterwards redeemed for 45*l.* sterling. The value of "the above deficiencies in the subjects sold amounts to upwards "of 3000*l.* sterling."

Upon this statement, the appellant founded a plea, that he was entitled to a deduction from the sum sued for, corresponding to the deficiency in the value of the property sold to him.

After the record had been closed, the appellant craved a fishing diligence for recovery of all writings, "tending to show "the value" of the property purchased, at the date of the conveyance in April, 1832, "to instruct what passed between the "pursuer and defender, or between the pursuer's agent and the

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" defender, at or about the period" of the first sale, the second sale, and the docqueting of the accounts, in June, 1832; " all " letters tending to instruct that the pursuer agreed to restrict " and limit the nominal price of his share of his father's suc- " cession to the sum of 7000*l.*," and " that the pursuer agreed " and undertook not to demand payment of the balance of his " share of the father's succession, until the defender should " sell, or otherwise dispose of the Canadian property; and that " the pursuer agreed to restrict his drafts upon the defender to " the annual interest of the sum left in his hands. And all " documents tending to instruct that certain parcels of the lands " contained in the deed of April, 1832, had been previously " sold in payment of taxes; and any conveyances or agreements " for conveyances of other parcels of the land in favour of " Connar."

The diligence asked by the appellant was refused by the Lord Ordinary, and afterwards by the Court. The cause then returned to the Lord Ordinary, who, on 23rd December, 1843, pronounced the following interlocutor, adding the subjoined note:—

" Finds it admitted by the defender, and proved other- " wise by writings produced, that he did, by indenture dated " 26th August, 1830, purchase and acquire right to the whole " succession, real and personal, which the pursuer, his near " relative, was entitled to claim, either by the will or otherwise, " as a legatee or heir of the deceased Richard Pattinson, of " Montreal, his father, subject to a power of redemption by the " pursuer at Whitsunday, 1832, if then disposed to exercise it: " Finds that the pursuer, in virtue of the said reservation, " insisted upon a farther consideration and sum being paid to " him as the value of his share of the said succession; and " accordingly, by indenture, dated 20th April, 1832, produced, " the defender agreed to pay 3000*l.* additional to the pursuer: " Finds that the said indenture contained a clause, 'whereby

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" 'the said Richard Pattinson, (pursuer,) for himself, his heirs,
" 'executors, and administrators, doth covenant, promise, grant,
" 'and agree to and with the said Arthur John Robertson, his
" 'heirs, executors, administrators, and assigns, that he, the
" 'said Richard Pattinson, hath not, at any time or times here-
" 'tofore, done, committed, or suffered any act, deed, matter,
" 'or thing howsoever, whereby, or by means whereof, the
" 'aforesaid estate, real or personal, is or shall be impeached,
" 'charged, or encumbered in any way howsoever:' Finds it
" not denied, that the defender acted upon and ratified the said
" agreements, by extensive intromissions with the estate of the
" defunct, and taking the whole management and administra-
" tion of the same, of which no account has been exhibited, or
" was exigible by the pursuer, subsequent to the said inden-
" tures: Finds that the said indentures were farther homolo-
" gated and ratified, by the defender making large payments to
" the pursuer to account of the said stipulated price: Finds
" that the defender has not offered to prove, in any competent
" manner, any relevant allegation or plea to entitle him now to
" be relieved from implement of the said covenants, either in
" whole or in part: And in respect that no specific objection is
" stated to the account, No. 9 of process, libelled on, assuming
" effect to be due to the indentures libelled on, repels the
" defences, decerns against the defender for payment to the
" pursuer of the balance of 3,925*l.* 11*s.* 4*d.*, with interest there-
" of, from and since the 31st day of May, 1842, till payment,
" as libelled: Finds the pursuer entitled to expenses, as the
" same may be taxed by the auditor, and decerns.

" *Note:*—The pleas or claims of abatement urged by the
" defender seem to be twofold:—

" 1*st.* Upon the averments in statement 3rd of his revised
" answers to condescendence, a deduction of 1000*l.* is claimed
" by the defender, as it is said to have been agreed to by the
" pursuer *at or prior* to the execution of the indenture of 28th

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" April, 1832, libelled on. That claim being inconsistent with " the formal written contract executed by the parties at that " time, is only provable by the *oath* of the defender; and as " no reference to that oath is made, it has been disregarded.

" *2nd.* The defender, upon his allegations in statement 7th " of condescendence, sets forth that sundry large properties, " said to have been specified in the schedules referred to in the " indenture, turned out to have been *sold* for payment of taxes, " or otherwise alienated, for which he is entitled to a large " *deduction* from the covenanted price. But it is thought that " such a claim is clearly irrelevant and untenable, on the fol- " lowing grounds:—

" (1.) The demand of the defender is of the nature of a " claim *quanti minoris*. He has never offered to give up the " whole succession and account for all his intromissions, but " seeks abatement from the price. On obvious grounds of law " such a claim is not maintainable.

" (2.) The claim of deduction urged by the defender is " inconsistent with the terms and meaning of the contract. " The pursuer was not asked to *guarantee* the schedules; all " that he became bound for was, ' that he hath not done any- " ' thing, &c., whereby the said estate may be impeached or " ' encumbered.' It is not alleged that the pursuer has violated " that obligation.

" (3.) The allegations of the defender, of errors and defal- " cations in the schedules, come *too late*. The defender says he " discovered them in 1833. But he did not propose then to " abandon his bargain, and *give back* the estate to the pursuer. " He seems not to have given any intimation of this claim to " the pursuer, till he lodged *Revised Answers* in this cause in " 1843. Even in his *Defences*, lodged 7th December, 1842, he " does not distinctly set forth the claim now chiefly insisted " upon.

" (4.) As Pattinson, senior, died many years prior to 1832,—

" and as the defender was himself a legatee of old Pattinson, " and had been in the possession and management of the pur- " suer's share of the succession as purchaser between August, " 1830, the date of the first indenture, and April, 1832, the date " of the second indenture, it is not credible, and cannot be " taken at his hand, that he did not then know how far the " schedules referred to in the indenture could be relied on or " not.

" There is one schedule produced, (No. 28 of process,) " marked 1832, to which no specific objection is made; and " unless there be some great error in that state, it would appear " that there was then above 24,000*l.* of assets, which was more " than sufficient to pay the price of the pursuer's share. But " the defender took his chance of this, and knew, at least as " well as a youth who had arrived at the years of majority only " two years before that agreement, what the estate was likely " to yield.

" The Lord Ordinary conceives that the granting such a " diligence as the defender asked, would lead to long and vex- " atious delay in the constitution of a liquid claim. If such " a diligence was necessary, it should have been asked for " long ago."

The appellant reclaimed, and on the 16th February, 1844, the Court before answer, allowed him to put in a minute " des- " criptive by date or otherwise, of any document or writing " which he can aver to exist in support of the averment" that the respondent had agreed to restrict the purchase-money to 7000*l.*

The appellant applied to a solicitor, who had been the common agent of himself and the respondent, for inspection of all letters which had passed from either of them to the other, but was refused inspection of any but his own letters. He then complied with the order of the Court by putting in a minute, which did not describe either by date or otherwise any document

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whatever, but simply stated the nature of his application to this solicitor, and its result.

The Court, on the 6th of March, 1844, pronounced this interlocutor:—" In respect that the demand for payment in the " summons, is founded on an express obligation contained in " the contract libelled on, find that the defender has failed to " prove, by any writings under the hand of the pursuer, or to " aver the existence of any writings sufficient to prove the con- " ditions which he alleges formed part of the agreement of " parties at the time when the said contract was entered into: " And further, find that the claim of deduction stated in respect " of the alleged deficiency in the extent of the Canadian pro- " perty, has not been competently introduced into this record, " and, as stated, is now wholly barred by the facts of the case: " Therefore refuse the said reclaiming note, and adhere to the " interlocutor reclaimed against, so far as it repels the defences " and decerns."

The appeal was against these different interlocutors.

*The Attorney-General* and *Mr. Anderson* for the Appellant.—I. The averment of the record, in regard to the sale of parts of the land previous to the sale to the appellant, was timeously stated, so long as it was done before the record was closed. At the time the defences were prepared, the appellant was not possessed of the information which enabled him afterwards to make that statement; and the very object of papers additional to the summons and defence being allowed, was to give the parties the benefit of laying before the Court any new statement or information. Even were this otherwise, the statement would have been admissible upon payment of costs, Donaldson *v.* Bannatyne, 9 *S. & D.* 333; but the respondent, by pleading over waived all right to ask for costs. Indeed, in Watson *v.* Edwards, 13 *S. & D.* 196, the Court allowed a new plea to be stated after the record had been closed, and refused to order payment of costs.

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II. Admitting this matter to be well pleaded in form, it is good in substance, for although the Courts in Scotland do not allow a rebate where the party claiming it is the actor, they do allow it where he is the defender, upon the same principle that in this country, the Courts require a party seeking to enforce a foreign decree, to establish that the decree is good and regular; whereas, if the party be defending himself upon a foreign judgment, the Courts assume the decree to be good and regular until the contrary is shown. Although the *actio quanti minoris* is not a favourite of the law, it is nevertheless admissible in some cases. Moreover, as the contract relates to land in Canada, the question must be regulated by the law of Canada, *lex rei sitae*, according to which a rebate is claimable. This in truth, however, is not a question upon the *actio quanti minoris*, in which the contract is affirmed but some abatement of the price or damage is demanded; here the action is for specific performance, and the abatement is only set up in defence, which is perfectly competent.

III. With regard to the diligence it was not possible for a party to remember the dates and particulars of a variety of letters and documents so as to be able to describe them, and it was not necessary that he should describe them. He was bound to prove any variation from the deed of 1832 *scripto*; this he undertook to do, and he was entitled to the diligence he asked, in order to enable him to do so without any such clog being put upon his demand as had been imposed by the Court below.

[*Lord Chancellor.*—Is not that matter of discretion for the Court?]

I admit it is.

[*Lord Chancellor.*—Then it has been exercised here.]

*Mr. Bethel* and the Honourable *Mr. Wortley* were heard for the Respondents.

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LORD CHANCELLOR.—My Lords, this case arises between parties who claimed under the will of the testator giving an estate in Canada to his son, subject to certain charges for the benefit of his younger children. The appellant having married one of the daughters, the son it appears gave up his interest in the estate, and the appellant agreed to purchase whatever interest the son might have in it. All this is contained in the deed to which I shall have occasion to advert for another purpose. Upon that purchase, the brother-in-law, the appellant, who married the sister, agreed to pay to the son of the testator, the brother of his wife, a certain sum of money for his interest in this property. But not being prepared to pay, or it being more convenient to him to postpone the payment, he gave him a promissory note for a sum, the balance of the purchase-money which remained unpaid; and upon application by the brother for the payment of this sum of money, he failed to obtain payment.

Upon this, a proceeding was instituted in the Court of Session, for the purpose of compelling the payment of that balance of the purchase-money. The case was met by two grounds of defence. The first is to be found in the 8th page of the appellant's case, in which he says: "By that transaction "the nominal price of the pursuer's interest, in his father's succession, was fixed at 8000*l.*, being 3000*l.* in addition to what "had been previously agreed upon. At this period it was "ascertained that the shares of the pursuer's two sisters, would "not amount to more than 7000*l.* each, and the defender accordingly purchased Mrs. Rose's share for that sum. Since the "pursuer was in this way to get 1000*l.* more by his father's "succession, than either of his sisters, it was expressly agreed "upon and formed part of the contract, that though the price "was nominally fixed at 8000*l.*, yet as the defender had never "seen the property, and had no proper knowledge of its real "value, and would be put to very heavy expenses in journeys

" to London and to Canada, and otherwise, in the settle-
" ment and adjustment of accounts with the trustees and
" others in the management of the estates; no more should
" be exacted from him, than 7000*l.*, in the event of his being
" dissatisfied with the property, or of his being a loser by becom-
" ing the purchaser of the pursuer's share. In that event, the
" whole members of the family were to be placed upon a foot-
" ing of equality. It was further agreed, that unless for the
" purpose of procuring a commission in the army, and for
" defraying his outfit, the pursuer was not to exact payment of
" the capital, but was to allow it to remain in the defender's
" hands, until he should sell or otherwise dispose of the Cana-
" dian property to advantage." That is one of the allegations. And to test, therefore, the probable truth of that statement, I will now refer your lordships to what is stated in the deed itself, by which Richard Pattinson, the respondent, transferred to Robertson, the appellant, his interest in the father's property. It states, that by a certain indenture, of the 26th of August, 1830, Richard Pattinson, the son of the testator, in considera-tion of the sum of 5000*l.* to him paid, by Arthur John Robert-son, did bargain, sell, assign, and so on, " to Robertson, all and
" singular, the estate, both real and personal, chattels and effects
" which pertained to Richard Pattinson, his father, at the time
" of his death, so far as he, Richard Pattinson, had any right
" thereto, in virtue of the last will and testament therein before
" recited, or otherwise, as heir-at-law of his father, to have and
" to hold the real estate to Robertson, and his heirs for ever, and
" the personal estate, with the profits and produce thereof, unto
" him and his heirs for ever, subject nevertheless to the condi-
" tions and provisions specified and contained in the will of the
" father."

Then comes this recital, " And whereas, the said trustees
" lately rendered to the parties interested in the said estate, full
" accounts of their intromissions therewith, together with

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"schedules and estimates thereof; and whereas the said "Richard Pattinson, having after full examination of the said "accounts, schedules, and estimates, come to the determination "of declining to take under the said will, on the conditions "therein expressed, the testator's said estate falls to be equally "divided between his children in terms of the will; and whereas "it appears from the estimates, that the value of the share of "the said estate, falling to the said Richard Pattinson, con- "siderably exceeds the sum of 5000*l.*, and the said Arthur John "Robertson has therefore agreed to allow and pay unto the "said Richard Pattinson, the further sum of 3000*l.* money "foresaid, as the balance of the value of his said share."

We have this deed, therefore, reciting that to be the offer of the appellant. He is satisfied from the state of the accounts, that his brother-in-law's share exceeds 5000*l.*, and he therefore offers and agrees to give him 3000*l.* more, in consideration of which Richard Pattinson transfers and hands over, (the usual words,) in behalf of John Robertson, "all and singular the estate, "both real and personal, wheresoever situate, goods, chattels, "and effects, which pertained to the said Richard Pattinson, "so far as he has right thereto, by virtue of the said will or "otherwise."

Is it possible, therefore, for words to express more distinctly the absolute purchase out and out of whatever right and interest the son might have in his father's property? And yet that being expressed on the face of the deed, the brother-in-law taking the property from the son, by an assignment of all his estate and interest therein, he says it was part of that contract and agreement, that all that was so recited in the instrument, should go for nothing; that that 8000*l.* was merely a nominal sum, not being the sum contracted for between the parties; and that the sum actually agreed to be paid, was to be the result of future inquiries aud future contingencies, as to whether it might

or might not turn out a profitable speculation for the appellant to purchase the respondent's interest.

That, however, my Lords, he puts forward as his defence.—I am now addressing myself to the occasion of the production of the instrument; and he then applies to the Lord Ordinary for a diligence against havers, upon which the Lord Ordinary states this:—"The Lord Ordinary having heard counsel on the "closed record, and more especially on the motion of the "defender for a diligence against havers, to recover the writs "set forth in the specification No. 50 of process, which he "insisted on his right to obtain *in modum probationis*, and before "debating the case on the merits, refuses the diligence craved "*in hoc statu*, and appoints the debate on the merits to proceed "at the Lord Ordinary's first hour in November."

And so the case went on upon the merits; the record was closed, and the Lord Ordinary made his interlocutor, which I shall presently refer to; and then, when it came before the Inner House, the appellant again applied for this diligence against havers, for the purpose, as he said, of proving his case.

The application which the Lord Ordinary had refused in the first instance, was the subject of an application to the Inner House, and it was again refused. But when the case came to be heard upon the merits, the second division of the Court pronounced the following interlocutor:—"The Lords having "advised the reclaiming note of Arthur John Robertson, against "Lord Cuninghame's interlocutor, dated the 23rd day of De-"cember last, and heard counsel for the parties thereon before "answer, allow the defender to put in a minute, descriptive by "date and otherwise, of any document or writing which he can "aver to exist in support of the averments contained in the "third statement of the record."

Now nothing can be more indulgent than this mode of proceeding. He makes his statement in very general terms. Still if there were any truth in the allegation, he states a

transaction to which he was himself a party. All parties agree that what is said to have been done could only be effectually shown by evidence in writing. It was something, therefore, which had passed either between himself and those with whom he was dealing, or between his agent and the agent of the other parties;—something to which he was either a party himself, or, at all events, a party through the means of his agent. And he is called upon to specify what this is upon which he relies—by which as he has stated upon the record, this contract so evidenced upon the face of the deed itself, has been varied—some other arrangement, the terms of which he is called upon to specify in the proceedings.

Now, my Lords, nothing can be much more general than the terms in which he describes, in the first instance, what it is that he requires. It is not necessary to refer to it, because the reading it through would be merely reading through a description of every possible document that could have existed at any time. But a letter is produced in the correspondence between the solicitors, in which we see a little what it is that he was relying upon, or rather, we see that there was nothing upon which he had to rely when he put in his defence. He says, "with "reference to the conversation which Mr. Belford and I had "with you to-day, I have to request that you will, at your very "earliest convenience, examine the correspondence in your "possession, between the late Mr. Alexander Shepperd, solici-"tor, here, Mr. Pattinson, and Mr. Robertson, during the "years 1833, 1834, 1835, and 1836, with the view of ascer-"taining the exact understanding entered into between Mr. "Pattinson and Mr. Robertson, as to the disposal of Mr. Pat-"tinson's interest in the property in Canada, which belonged "to his father."

Now these parties had come to a final conclusion—they had executed a deed in which the contract between them was distinctly specified. It is perfectly immaterial, therefore, what

the understanding might have been at any time, anterior to that deed; and here, when he is making inquiry, what documents may be capable of being produced for the purpose of establishing his case, he does not speak of any contract varying the terms of that deed; but all he wants is to find out what was the understanding between the parties. My Lords, there can be no understanding between the parties capable of affecting the provisions of that deed, unless there be some contract or some evidence in writing by which the terms of that deed are varied or departed from. He cannot tell what that is. He declines to comply with the requisition of the Court of Session, by which he is only asked to specify and describe what this is upon which he relies. He does not do it because he cannot do it, because in the nature of the case it is obvious that it did not exist. It appears to be, as the Lord Ordinary has said, a pretence for delaying the period within which he should be called upon to pay the money.

Now, my Lords, the powers of the Court in making these orders are discretionary. By "discretionary," I mean, of course, that they are to be regulated by the rules which regulate the administration of justice; but it is not a matter of right to which the party is entitled as a matter of course, but it is in the discretion of the Court to be regulated according to the circumstances of the case. In this case, I think the Court have exercised a most wise and salutary discretion, having put the party to specify what it is that he wants, and when he cannot tell them, not to delay the administration of justice on this ground. So much, my Lords, for the first point in this case, as to refusing the diligence against havers.

Now, my Lords, the second ground of defence which the appellant rests upon is to be found, not in the original defence, but is to be found in the statement of facts by the defender, which he put in after having put in his regular defences; the answer to the summons being totally silent in this respect,

taking no notice of it at all. In his second statement, the statement of facts, he states this:—"On reaching Canada, the "defender discovered that a large and valuable section of "land, contained in the schedules and conveyance before men- "tioned, and amounting to upwards of 1600 acres had been "sold in payment of taxes due from the estate. Further, "the defender found that the pursuer's father had laid himself "under an obligation to grant a title in favour of a person of "the name of Connar, to another section of land, situated in "the United States, and which was likewise represented to the "defender as forming part of the estate purchased by him; and "the defender was himself under the necessity of executing a "conveyance of said section, in implement of the late Mr. "Pattinson's obligation. He further discovered that another "section of land, consisting of about 100 acres, and situated in "the London district, township of Blenheim, and contained in "said schedules, and forming part of his purchase, had likewise "been sold in payment of taxes. Moreover, in the eastern "district, another small portion of land had been disposed of in "payment of taxes, and which the defender afterwards redeemed "for 45*l.* sterling. The value of the above deficiencies in the "subjects sold amounts to upwards 3000*l.* sterling."

That is his statement, therefore, that he found the landed property was not such as he had expected; that he found that certain portions had been sold for the payment of taxes, and other circumstances connected with the property, which diminished the value. This he does not state, as I before observed, in the defence to the summons, but in his statement of facts.

Now all this is perfectly immaterial, for what he has purchased is not an ascertained quantity of land to be paid for so much by the acre, giving the means by which the Court can ascertain to what extent he ought to be relieved from the purchase-money. It is perfectly immaterial, if what he has purchased was all the interest of the party from whom he

purchased, what the extent of it might be. Having married one of the sisters, he probably knew a good deal more of the estate than the person from whom he was purchasing. He states that the accounts had been transmitted by the trustees in Canada; there is no fraud or misrepresentation alleged in the statement remitted by the trustees; and then he states that he, Arthur John Robertson, had agreed to allow and pay to Richard Pattinson, the further sum of 3000*l.* more than the sum which he before had agreed to pay, in consideration of which Mr. Pattinson assigned to him "all and singular the estate, both real and personal, "wheresoever situated, goods, chattels, and effects, which per- "tained to the said Richard Pattinson, his father, so far as he "has right thereto by virtue of the said will or otherwise."

Now it is impossible to find terms which can more distinctly express the purchase of all such interest as the son had. There is no reference to quantity; nothing by which it was to be ascertained whether the sum was too much or too little; but, whatever it might be, it was purchased by the brother-in-law at the sum fixed.

Under these circumstances it is quite immaterial to consider whether the statement I have alluded to was properly introduced, or not properly introduced into the record. It has no reference to the subject matter of the transaction between the parties; and, therefore, in my opinion, this defence on this ground totally fails; and I should, therefore, advise your lordships to affirm, with costs, the interlocutor appealed from; and I must say, that this is one of the most ungracious defences against a legitimate demand which has come under my consideration.

It is ordered and adjudged, That the said petition and appeal be, and is hereby, dismissed this House; and that the said interlocutors, therein complained of, be, and the same are hereby affirmed. And it is further ordered, That the appellant do pay, or cause to be

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paid, to the said respondents, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

GEORGE PARSONS—RICHARDSON and CONNELL, Agents.

[HEARD February 13th—JUDGMENT August 13th, 1846.]

MISS ANN MC PHERSON, *Appellant.*

MRS. MARIA SOPHIA MC PHERSON, *Respondent.*

*Fiar and Liferenter.—Provision to Heirs. &c.*—In ascertaining the free rents of lands, in order to fix the amount of a widow's annuity, the fiar of the lands is not entitled to deduct a proportional part, either of the expense of maintaining an embankment against the encroachments of a river, paid by himself and not forming a deduction from the rent payable by the tenant of the lands;—of the expense of repairs upon the parish church;—or of the amount of a factor's fee.

*Ibid.—Ibid.—Game.*—In ascertaining the amount of a liferentrix's provision out of the rents of lands, credit must be given for the money annually received by the fiar from third parties, for the right of shooting the game upon the lands; and for the rent obtained for the *home*-farm, although "the mansion-house and policies and enclosures thereto belonging," were excepted from the provision.

*Ibid.—Ibid.*—An annuity given to his widow by an heir of entail, under a power in the entail to provide wives in a liferent infeftment, not exceeding three-fourths of the free rents of the lands, is to be a fixed annuity, calculated according to the amount of the rents in the year in which the heir, granting the annuity, died; not one varying *de anno in annum*, according to the amount of rents actually received.

*Ibid.—Tailzie.—Trust.*—A widow's annuity given by her contract of marriage in exercise of a power in an entail to provide widows, and in the form of an obligation upon the husband, "and the heirs of entail succeeding to him in the tailzied estate," is payable not only out of the lands actually entailed, but out of personal estate held by the trustees of the entailer's will upon trust to be invested in the purchase of lands to be entailed, and out of lands purchased, but not entailed, in the lifetime of the maker of the provision.

ON the 4th of September, 1789, Mc Pherson executed a bond and disposition of entail of his lands in favour of a series of

heirs, which gave the heirs a power to provide their wives or husbands in the following terms:—"As also, it is hereby pro- "vided and declared, that it shall be lawful to the whole heirs "and members of tailzie foresaid, as they shall come in course "to succeed to the said lands and estate, to grant liferent infeft- "ments, by way of annuity, but not of locality, to the extent "underwritten, to their spouses, in satisfaction to them of all "terces, courtesies, and other legal provisions, from which their "said spouses are altogether hereby debarred and excluded, pay- "able at Whitsunday and Martinmas, by equal portions, to be "uplifted and taken furth of the first and readiest of the rents, "maills, and duties of the foresaid lands and estate, herein-above "resigned, lying and described in manner above mentioned: "But it is hereby likewise provided and declared, that the said "liferent infeftments, by way of annuity, shall not exceeed one- "fourth part of the free yearly rent of the said lands and estate, "as the said free yearly rent shall stand at the time of the death "of that heir of tailzie upon whose death the said annuities "shall respectively become due, after deduction of every public "and private burden affecting the same, of whatever kind or "nature the said burdens may be; so that, in case the spouse "of any heir of tailzie shall come into possession of an annuity "upon the said lands and estate during the existence of a prior "annuity, or annuities upon the same, such spouse shall be "entitled to no more than one-fourth part of the free residue "of the said rents, after deducting therefrom the said prior "annuity or annuities, as well as deducting the annuities to "younger children, hereinafter mentioned, procreated in any "prior marriage, and all other private or public burdens "whatsoever; but providing and declaring, that in case of the "existence of two or more spouses holding annuities, as afore- "said, at the same time, the larger annuity shall, upon the "death of the spouse holding the same, devolve upon the "spouse holding the immediate lesser annuity, if such last-

" mentioned spouse should be existing at the time, in lieu and " place of such lesser annuity, which lesser annuity is to be no " longer payable to the spouse so succeeding to a greater " annuity."

On the 7th June, 1793, Mc Pherson executed a last will and testament which, after referring to the entail of 1789, and giving a variety of legacies, contained the following direction as to his residuary estate:—

" I request and direct the executors of my will hereafter " mentioned, to consolidate into one fund, the whole of my " fortune and moveables, which fund they are to lay out in pur- " chasing lands in Scotland, to be entailed upon the series of " heirs specified in the bond and deed of entail already men- " tioned, according to the strict forms of the law of Scotland."

On the 19th September, 1795, Mc Pherson superseded the entail of 1789, by executing another entail which embraced the lands contained in that deed, and other lands which he had since purchased. This entail contained the following power in regard to providing wives and husbands: " Nor shall the said lands " and estate, or any part thereof, be affectable, or subject to, " any terces or courtesies, or to any annuities or liferent pro- " visions to the wives or husbands of the heirs and substitutes " above written: but with this exception, nevertheless, from " the foresaid limitation, that it shall be lawful to, and in the " power of the said heirs, male or female, of my body, and " whole other heirs of entail before specified, and each of them, to " provide their wives and husbands, and the wives and husbands " of their apparent heirs, an annuity, not exceeding a fourth " part of the free rents of the said estate, after deducting former " liferents, if any be, interest of entailer's debts, feu and teind " duties, cesses, land-taxes, minister's stipend, and any other " burdens that may affect the same, so that subsequent annuities " shall not exceed a fourth part of the surplus rents, but may " increase proportionally, as the former annuities and debts

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" shall cease and be paid off; and for which annuities to be " granted in virtue hereof, the heirs of entail succeeding in " virtue hereof, shall, under the declarations after mentioned, be " subject and liable; but declaring always, that the annuities so " to be granted to the wives or husbands of heirs, shall not in " any event be the ground of any adjudication of the said " entailed lands and estate, or any part thereof, or of any dili- " gence that may be the ground of any eviction of the same; " but, that the claim of the said wives or husbands shall " extend no farther than to a personal claim against the heir of " entail in possession for the time; and that an heir of entail " succeeding to the said estate, shall not be liable for the arrears of " any annuities that may be granted to the said wives or husbands " further than to the extent of one year thereof, and that only " after discussing the executors or representatives of the heir " of entail in possession, when the said arrears were incurred: and " declaring that the wives or husbands of such heirs, shall, in no " case, have right to possess the mansion-house of Belleville, or " policy, or inclosures thereto belonging, which shall be always " reserved for the heir of entail for the time." This deed also contained a direction as to payment of the entailer's debts, in these terms: " And in order to render this deed of entail and " settlement more effectual, I hereby bind and oblige me, and " my heirs of law, executors and successors whatsoever, to free " and relieve my entailed lands and estate before specified, " and the heirs named, or to be named, to succeed thereto, " off and from the payment and performance of all debts " and obligements, in which I, for myself, or as representing " any of my predecessors, shall be liable at the time of my death, " and off and from all claims and demands whatsoever, whereby " the said lands and estate, or any part thereof, may be evicted " from my said heirs of entail."

On the same day that he executed this last entail, Mc Pherson executed a trust-disposition, which reciting that he held

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an heritable bond over the lands of Blairgowrie for 4,600*l.*; that he had that day executed an entail of his lands, and that he was desirous that the sum in this bond should be invested in the purchase of lands, to be likewise entailed, he conveyed the bond to trustees, with the following direction:—"But in "trust always, and under the provision underwritten: Provid- "ing and declaring, that my said trustees, and their foresaids "shall be bound and obliged, as soon as they shall enter upon "their office of trustees, in virtue hereof, to demand payment "of the foresaid principal sum of 4,600*l.*, contained in the "heritable bond before narrated, and haill interest that may be "due thereon; and upon receipt of the said principal sum "and interest, they shall be bound to employ the same in such "manner as they shall think most proper and expedient for the "purposes of the trust committed to them. And they shall, as "soon as an opportunity of what shall appear to them to be a "proper purchase, or purchases, shall occur, be bound to lay "out the same in the purchase of one or more parcels of ground "lying in the county of Inverness, and as near my said entailed "lands and estate as can be procured. And, so soon as the "whole of the said principal sum, interest thereof, and profits "that may arise therefrom, or from such partial purchases as "they may make, shall be laid out in the purchase of lands, "the said trustees and their foresaids shall be bound and "obliged to execute an entail of the whole lands so purchased by "them, upon the heir of entail who may be in possession of my "said entailed lands and estate, in virtue of the foresaid deed of "entail executed by me upon the heirs thereby substituted to "him, under the conditions, limitations, restrictions, clauses "irritant and resolutive, contained in the said deed of entail, "and precisely in the terms thereof."

The entailer died in February 1796. Some years afterwards, and posterior to the date of the contract of marriage to be afterwards noticed, the trustees executed the trust as to the Blair-

gowrie bond, by calling up the money in the bond, and investing it in the purchase of lands, which they entailed agreeably to the trust.

In the year 1802, the trustees of the entailer's will purchased, with the proceeds of his residuary estate, the lands of Fairburn; and on the 7th of June, 1802, took a conveyance of them to themselves, upon the trusts of the will.

In the same year (1802), James Mc Pherson, the institute in the entails, both of 1789 and 1795, and one of the trustees of the will of the entailer, entered into a marriage with the respondent, and by antenuptial contract, bearing date 9th December, 1802, he granted the respondent the following obligation:—"In contemplation of which marriage, and in considera- "tion of the sum of money after mentioned, paid by the said "Miss Maria Sophia Craigie to the said James Mc Pherson, "and of the assignation and conveyance underwritten, granted "by her, the said James Mc Pherson binds and obliges himself, "and his heirs and successors, and also the heirs of tailzie suc- "ceeding him in the tailzied estate of the said James Mc Pher- "son, senior, his father, to content and pay the said Miss Maria "Craigie, yearly, during all the days of her life after his death, "in case she shall happen to survive him, a free annuity, equal "to one-fourth part of the free annualrents, issues, and produce "of the whole tailzied estate of the said James Mc Pherson, as "after described; as also, to pay her yearly, in the event fore- "said, an additional free annuity, equal to one-fourth part of the "free annual profits, rents, interests, and produce of the said "James Mc Pherson's whole estate and effects still under trust, "or to which he has succeeded, or may succeed, by and through "the will of his said father; all as permitted by and in terms "of the entail executed by the said James Mc Pherson, senior, "of date 19th September, 1795." In security of the fulfiment of this obligation, he conveyed the entailed lands, so far as authorized by the entail of 1795, and gave the following obligation:—"And farther, the said James Mc Pherson hereby

" assigns, conveys, and makes over to the said Miss Maria " Sophia Craigie, in liferent during her life, in case she shall " happen to survive him, one-fourth part of the free yearly " proceeds, rents, profits, and issues of the said tailzied estate, " with power to her to uplift the said yearly rents, issues, " profits, and proceeds, to the extent aforesaid, or to concur " with the heir of tailzie in possession of said estate in appoint- " ing a factor to levy the rents and issues thereof, and who " shall be bound to account to her for one-fourth part of the " free annual proceeds collected by him, and that half-yearly " and termly, as the said rents and proceeds come into his " hands, and that in payment and satisfaction to her of her said " first-mentioned liferent-annuity, secured upon the said tail- " zied lands and estate: and further, the said James Mc Pher- " son obliges himself, and the heirs of tailzie succeeding him, " and his heirs and successors whomsoever, to secure the said " Miss Maria Sophia Craigie in one-fourth part of the free " yearly rents, interests, and produce of the residue or reversion " of the whole estate of the said James Mc Pherson, his father, " which is not conveyed by the aforesaid entail, but to which " the said James Mc Pherson, now of Belleville, has right by " the will of his said father; and that, in payment and satisfac- " tion to her of the said additional liferent-annuity above men- " tioned: and, accordingly, for her further security, and more " sure payment of said additional annuity, as soon as the said " separate estate of the said James Mc Pherson, coming to " him by his father's will, which is still under trust, or at least " not fully made over to him, shall be vested in land, or other " real securities, he obliges himself and his foresaids, to infeft " and sease his said spouse in liferent therein, to the extent of " one-fourth part of the free annual proceeds of the said whole " separate estate when so vested."

The respondent accepted the provision given her by this deed in full of terce and *jus relictae*, and in return paid over to her husband 1200*l.*, and assigned to him her whole other real

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and personal estate. The respondent was infeft under the precept of sasine contained in this contract upon the 7th January, 1804, and her infeftment was duly recorded.

Of the same date as the contract, (9th December, 1802,) Mc Pherson executed a disposition which recited the execution of the contract of marriage and the obligation in it to pay the respondent an annuity equal to one-fourth of the annual produce of the entailer's own estate stil un der trust, and the purchase of the lands of Fairburn, and continued thus:—"And whereas "said purchase was made for my behoof; but, the executors "under my father's will, not having yet denuded themselves of "the trust, and made over the said trust-effects to me, the titles "to said purchase were taken in their names jointly with me: "and whereas it is proper that the said Miss Maria Sophia "Craigie should be infeft and seised in the said estate, for "security of her liferent right to an annuity equal to one-fourth "part of the rents thereof." On this recital the disposition conveyed the lands of Fairburn in implement of the obligation in the contract of marriage, and assigned to the respondent one fourth of the rents of the lands under reservation of a right to sell the lands, and a corresponding obligation to pay her one-fourth of the interest of the price or of the rents of the lands in which the price might be reinvested.

In the year 1803, James Mc Pherson, the respondent's husband, brought an action of declarator and adjudication, in which he obtained a decree in December of that year, finding that the entail of 1789 was revoked by the entail of 1795; that the fetters in the entail of 1789 were to be held as not referred to in the will of 1793, but were void and null; that the order in the will to entail the lands to be purchased did not apply to the fetters, or the series of heirs in the entail of 1795: "but that, according "to the true and legal construction of the said latter will and "testament of the 7th June, 1793, when considered with due "reference to the whole other settlements made and executed "by the said deceased James Mc Pherson, and with the whole

" other circumstances of the case, the lands and estate of Fair-
" burn already purchased by the said executors with a part of
" the English executry funds of the said testator, and all other
" lands and heritages to be purchased by them with the balance
" of the said English executry funds in their hands, and with
" the capitals appropriated by the said executors for answering
" annuities as they fall, must be settled and entailed upon" a series of heirs, " being that part of the series of heirs contained " in the bond and disposition of tailzie of 1789, alluded to in " the said latter will and testament, 7th June, 1793, remaining " in force and unrevoked: and that the said lands and others " already purchased, or to be purchased, must be so settled and " entailed without prohibitory, irritant, and resolutive clauses, " or other fetters or limitations whatsoever," and ordaining a conveyance to be executed accordingly. Under this decree, James Mc Pherson established in himself a fee-simple title to the lands of Fairburn.

The executors under the will of the entailer, used inhibition against James Mc Pherson, and brought an action for reducing the decree which has just been mentioned, and in July, 1825, obtained decree of reduction containing a declaration " that the said James Mc Pherson, as the surviving dis-
" ponee infeft in the lands of Fairburn, under the disposition
" thereof from Alexander Mackenzie, of Fairburn, granted to
" him, along with Sir John Mc Pherson and John Mackenzie,
" both now deceased, is not debarred from selling the same, for
" the *bonâ fide* purposes of the trust referred to in the said dis-
" position: but, that he is bound to execute a tailzie, either of
" the said lands, free of all incumbrances, or of other lands to
" be purchased with the price thereof, in favour of the series of
" heirs specified in the tailzie 1789, and under the ordinary
" fetters contained in strict entails, restraining from altering the
" order of succession, contracting debt, or alienating the lands,
" all as authorized by the Act of Parliament 1685: approved,

" and hereby approve, of the foresaid draft of clauses prohi-
" bitory, irritant, and resolutive, prepared for the consideration
" of the Court by Mr. Alexander Monypenny, in terms of the
" former deliverance; and decerned, and hereby decern, accord-
" ingly: and further, in respect the said James Mc Pherson
" has found caution, as aforesaid, to execute such tailzie, in the
" terms so adjusted, either of the said lands of Fairburn, free
" of all incumbrances, or of other lands to be purchased as
" aforesaid; and also, in the event of his selling the said lands
" of Fairburn, to consign the price thereof, under deduction of
" necessary charges, in the bank of Scotland, or royal bank of
" Scotland, or bank of the British Linen Company, to remain
" so consigned until it shall be invested in a purchase of other
" lands, in such manner that the same may, at the sight of the
" Court, be duly entailed, in terms of the decree of the Court;
" recalled, and hereby recal, the inhibition complained of:
" ordained, and hereby ordain it to be marked on the margin
" of the record of inhibitions, that the same is recalled by
" authority of the Court; and decerned, and hereby decern."

All the trustees of the entailer's will died, with the exception of James Mc Pherson, who was thus the surviving disponee in the conveyance of the lands of Fairburn to the trustees of the will. James Mc Pherson died in April 1833, without having performed all the trusts of the will, leaving the lands of Fairburn vested in himself as surviving trustee, without having either sold them or executed an entail of them in terms of the interlocutor of July 1825.

Upon the death of James Mc Pherson, the appellant succeeded to him, as heiress under the entail and under the will. She made up her titles under the entail, and also took possession of the lands of Fairburn, and with the view of establishing her title to these lands and to the other estates derived under the will, she brought an action of declarator and adjudication against the parties interested. In this action she

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obtained a decree on the 12th of November, 1834, which declared "that the said trust, created by the said latter will and "testament before narrated, notwithstanding the death of the "said trustees, subsists effectually for the benefit of the pursuer, "and those who have the substantial and radical interest therein, "and that the pursuer is entitled to have the said trust, and "means and property belonging to the same, transferred to her "and the other heirs of tailzie called to succeed to her by the "foresaid bond or deed of tailzie of 1789, in their order succes-"sively, for fulfilment of the purposes of the said trust, in so "far as they are not yet fulfilled, and for behoof of the various "parties interested therein, according to their respective rights "and interests; and that the pursuer, and the said heirs of "tailzie in their order successively, are entitled to proceed "to the execution and fulfilment of the trust, for behoof of "themselves and those who have the substantial and radical "interest therein, either primary or reversionary; and declared, "and hereby declare, that the pursuer, and the other heirs of "tailzie in their order successively, have the full right and title "to the said lands of Fairburn and others, in the same manner "as it stood in the persons of the said deceased trustees, and of "the said deceased James Mc Pherson, last of Belleville, as the "last survivor of the said trustees; but in trust always, and "subject to the various conditions and provisions, and for "fulfilment to the various parties interested therein, according "to their respective rights and interests, of the purposes of the "said trust;" and adjudged the lands of Fairburn to belong to the appellant, and the series of heirs called by the entail of 1789; "but in trust always, and subject to the various con-"ditions and provisions, and for fulfilment to the various parties "interested therein, according to their respective rights and "interests, of the purposes of the said trust; and subject to "all the claims, rights, and interests of the said Mrs. Maria "Sophia Craigie (the respondent), in so far as these shall be

" found legally to affect the said estate, all objections of every " kind, and the answers thereto, being reserved entire to both " parties." This decree repeated the finding in the decree of July 1825, in regard to the right to sell Fairburn for the purposes of the trust, and the obligation to reinvest the balance of the price in the purchase of lands to be entailed.

The appellant expede a crown charter of adjudication upon this decree, on which she was infeft in April 1836.

During the dependence of the action at the instance of the appellant, which has been mentioned, the respondent brought an action against the appellant, setting forth the provision made for her in her contract of marriage with James Mc Pherson, and concluding to have the appellant decerned to pay her an annuity equal to one-fourth of the free rents of Belleville, (the entailed lands,) after deduction of any former liferents, and all public and parochial burdens; the annuity to commence at Whitsunday 1833—the first term after her husband's death—and to be under deduction of monies already received; and likewise to pay her an annuity equal to one-fourth of the rents and profits of the lands of Fairburn, and of the other trust-property, as these rents and profits stood at the time of the death of her husband, after deduction of the debts for which the trust-estate was liable, and public and private burdens; the annuity to commence from the first term after the death of her husband.

The appellant, after assuming possession upon the death of James Mc Pherson, had let the *home* farm, which, in the questions that arose in the action that has been last-mentioned, she maintained came within the exception in the entail 1795, of " the " mansion-house and policies or inclosures thereto belonging;" and she also let from year to year the shooting of game upon the lands, at an average rent for the five years preceding 1833, of 180*l.* And in the management of the estate she was, according to her statement, at a yearly expense of from 80*l.* to 100*l.* in maintaining an embankment to restrain the over-flowing of

the river Spey, which but for that would create great damage to the lands.

In defence to the action of the respondent the appellant pleaded:—

I. That the claim of the respondent was to be dealt with as one merely personal against the appellant, her infeftment being in contravention of the entail, and otherwise bad.

II. That the respondent had no right to anything beyond a fourth part of the free rent of the lands of Belleville, entailed by the deed of 1795, as the same was actually realised from time to time; and that in estimating this fourth, the mansion-house and policy of Belleville, and inclosures thereto belonging, including the *home* farm were to be excluded.

III. That the respondent was not entitled to any part of the rent of the lands purchased with the proceeds of the Blairgowrie bond, as they were not included under the entail of 1795, the respondent's contract of marriage, or her summons.

IV. That the respondent was not entitled to any part of the rent of the lands of Fairburn, as they were never vested in James Mc Pherson, otherwise than as trustee of the entailer's will; were now vested in the appellant as such trustee; and never were comprehended under the entail of 1795.

V. That the annuity of the respondent was subject to the following deductions:

1st. Of the interest of one-fourth of a debt for improvements upon the entailed lands, made by her husband, and constituted a debt against the heirs of entail under the 10 George III.

2nd. Of one-fourth part of the annual expenditure in maintaining the embankment of the river Spey.

3rd. One-fourth of the expense of repairing the parish church, and repairing and upholding the buildings, farm-offices, and fences upon the lands.

4th. One-fourth of a factor's salary and the necessary expenses of management.

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VI. That in computing the respondent's annuity, the following items should not be taken into account:

1st. Unrecovered arrears of rent.

2nd. The rent of the *home* farm, as being included within the exception of the mansion-house policy and inclosures.

3rd. The money received annually for the right of shooting, as not being of the nature of rent and being variable in its amount from year to year.

The Lord Ordinary, (*Moncrieff*,) reported the cause to the Court upon cases for the parties, but added to his interlocutor the following note:

"After much consideration of this cause, which appears to "be of great importance to the parties, and involves matters of "law of considerable moment, in so far as a very special case "can do so, the Lord Ordinary has come to the opinion, that "it is, in the circumstances, his duty to report it without pro-"nouncing a judgment. His reason for doing so will be seen "in the reference necessarily made to a former judgment of the "Court. But, having given much study and thought to the "case in the important points, and having been thereby brought "to an opinion on those points, however difficult he may have "thought them, he feels it to be his duty to explain his views "of the case fully, and to give the party interested, whatever "benefit she may derive from that opinion.

"There is much able reasoning in these revised cases; but, "in both of them, some which is not satisfactory to the Lord "Ordinary's mind. When the defender maintains that nothing "but an infeftment in an heritable estate could vest the powers "of providing the annuity here claimed, and tries to illustrate "the proposition by common rules applicable to land estates "descending by succession on ancient titles, she evidently "throws aside the fundamental fact, that there is no ancient "title and that all depends on the will of one man, the imme-"diate author of the granter of the onerous settlement in ques-"tion. All the deeds executed by that gentleman, the prede-

" cessor of the pursuer's husband, must be considered together, " and as making one settlement, in so far as they were subsisting " at his death; and the question is, what is the true and legal " import of them all, in regard to the matter here in discussion? " There is no technicality in it; the deeds being all the deeds " of one man, who was completely *rei suæ arbiter*.

" The defender says, towards the end of her paper, that this " is not a question of *intention* but of *power*. It is a question " both of *power* and *intention* on the deeds of the pursuer's " husband; but as to the deeds of James Mc Pherson, the " *entailer*, all the questions of *power* in relation to his heirs " depend absolutely on the *intention*, as it may be found in all " the deeds which he executed, when duly considered together. " And more particularly, it can admit of no question, that, with " reference to the *personal estate* left by him, the rights, inte- " rests, or powers, of his heir affecting it, must depend entirely " on the will and intention expressed, or necessarily involved " in *all* the deeds which he left in operation, and not merely " on the single expressions of a particular deed. The Court " is bound to look anxiously for the whole will of the testator.

" On the other hand, when the pursuer assumes, that, be- " cause there was an ultimate end in view, all the natural con- " sequences of it must take immediate legal effect, the process " of reasoning is too rapid, and the conclusion unwarranted.

" The fact which gives rise to the present cause is, that, in " the year 1802, the late James Mc Pherson entered into an " onerous contract of marriage with the pursuer, by which a " provision in certain terms was settled on her. As to the " meaning of that settlement in regard to the estate and funds " over which it should extend, it seems to the Lord Ordinary " to be impossible to make a serious question. Quite clearly, " it was *intended*, and in words made to cover, not only all the " entailed estate of Belleville, as it stood at the date of the " contract, but also all the estate then standing in trust-funds; " but expected to be converted into entailed estate. The terms

" of the deed are so explicit as to admit of no doubt or ambi-
" guity. They are direct as to the estate of Belleville, and
" separately direct and explicit as to the trust-funds. No man
" can doubt, that if Mr. Mc Pherson believed this to be within
" his *power*, it was fair and right, whatever may be the effect of
" it; and, considering the nature of the settlement of old James
" Mc Pherson, and the many years which elapsed after his
" death, before the pursuer's claim for her annuity emerged,
" there is little reason to doubt, that the pursuer and her
" friends, at the time of her marriage, were very reasonably
" entitled to believe that all the covenants of the contract
" would long before that time be secured of full implement,
" according to their plain meaning. The Lord Ordinary thinks
" it quite unnecessary to go into any discussion on the import
" of the marriage-contract in *this* point, conceiving it to admit
" of no reasonable controversy. But it is most important that
" the present question is based on the fact that such a marriage
" contract was *bonâ fide* concluded, and took effect in the
" marriage of the parties.

" The question, therefore, is, whether the pursuer's husband
" had *power* to engage for what he promised and bound himself
" to, or how far his honourable intentions towards the lady with
" whom he contracted, are defeated by the form or meaning of
" the deeds on which his rights and powers depended. She
" is certainly entitled to fair and full implement, in so far as
" her husband had, by any just and reasonable construction of
" the settlements of his predecessors, power to contract with
" effect in terms of her marriage-contract.

" I. There can be no doubt that the pursuer has a good
" right to an annuity equal to one-fourth of the free rents and
" profits of the estate of Belleville proper, and all the lands
" comprehended in the entail 1795. This seems to be ad-
" mitted. The mode of estimating it is a different question.
" But Mr. James Mc Pherson clearly had power to bestow such
" a right, and he has done so in very express terms. It is to

" be made effectual in terms of the entail, by a claim against the " heir of entail in possession for the time.

" II. The Lord Ordinary is next of opinion, that the pur- " suer has right to an annuity equal to a fourth part of the rents " and profits of the lands, which were purchased by means of " the money recovered under the Blairgowrie bond of 4,600*l.*, " with the interest and accumulations upon it. He cannot " think this at all doubtful. That bond was specially con- " veyed by the trust-deed of the 19th September, 1795, " executed on the *same day* with the *second entail* of the " estate of Belleville, to which it expressly refers, as containing " the destinations, conditions, limitations, &c. &c.; 'and other " 'clauses and conditions therein expressed;' and the trust- " deed bears, that it was the testator's wish and intention, that " the money in the bond should 'be laid out in purchasing " 'lands, &c., to be entailed upon the same series of heirs, *and* " '*under the same provisions, limitations, and clauses contained* " '*in the said deed of entail.*' On this narrative, the bond and " all the sums contained in it, and interest thereof, and the right " of annualrent held heritably under it, were conveyed to the " trustees, with power to uplift the same, and to hold all till " they should vest it in lands, and make an entail thereof in the " manner directed; with an obligation on them, as soon as a " proper opportunity should occur, to lay out the whole princi- " pal and interest and accumulated profits in the purchase of " lands, and then to execute an entail thereof 'upon the heir " 'of entail who may be in possession of my said entailed lands " 'and estate *in virtue of the foresaid deed of entail* executed by " 'me upon the heirs thereby substituted to him, under the " 'conditions, limitations, restrictions, clauses irritant and reso- " 'lutive contained in the said deed of entail, *and precisely in the* " '*terms thereof.*'

" There can be no doubt concerning the meaning and effect " of this settlement; and as any entail to be executed under it " must necessarily have contained all the limitations in the

" entail 1795 referred to, and among them the exclusion of the " right of terce, so it must also have contained a clause, in the " very words of that entail, empowering the heir in possession " to provide his wife in an annuity equal to one-fourth of the " free rents and profits of the lands so to be acquired and " entailed.

" If the property so put in trust had stood in that trust, " without an investment having been effected, or an entail " executed, till the death of the pursuer's husband, though " there might have been room for argument as to the operation " of the provision in the marriage-contract as affecting it; and " though, in consequence of a certain judgment of the Court in " 1816, concerning the intermediate accruing interests of the " bond, there might have been a necessary *suspension* of the " beneficial interest in it, till lands were entailed, the Lord " Ordinary would have had great difficulty in holding, that " there was not, according to the true meaning of the whole " settlement, such a right vested in James Mc Pherson, as " might enable him to provide to his wife the proportional " annuity intended by the entailer, to take effect as soon as the " possible application of it should emerge by the due execution " of the trust. But it seems to him to be unnecessary *here* to " consider any such question, the actual state of the case remov- " ing in his mind all doubt. For, long before the death of " James Mc Pherson, the pursuer's husband, the debt was " realized, lands were purchased, and, though the deed is not in " process, it is admitted that an entail was executed, which, " the Lord Ordinary presumes, was in the precise terms of the " entail 1795, on which James Mc Pherson *stood infeft* and in " possession at the time of his death. As he, therefore, as the " first heir of entail, did become vested in these lands, with all " the powers given or reserved by the entail, the Lord Ordi- " nary is of opinion, that it is of no consequence as to the effi- " cacy of the settlement by marriage-contract in favour of his

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" wife, to take effect at his death, whether that settlement was " executed before or after he was so invested. He apprehends " that Mr. Mc Pherson was entitled and empowered to bind " himself onerously to provide, and in anticipation of the due " execution of the trust, directly to provide, to his wife, an " annuity equal to one-fourth ' of the free annual profits, *rents*, " ' interests, and *produce* of the said James Mc Pherson's *whole* " ' *estate* or effects still under trust, or to which he has suc- " ' ceeded, *or may succeed*, by and through the will of his said " ' father, all as permitted by, and in terms of, the entail 1795;' " and whatever questions may arise on this settlement with " regard to the personal property put separately under trust, " the Lord Ordinary can see no reasonable ground for doubting " that it is an effectual exercise of the power expressed in the " entail of these lands, (in conformity to that in the entail 1795,) " to which Mr. Mc Pherson actually *did succeed*, and which " became *part of his estate*, held by valid infeftment before his " death. Perhaps it may not be simply on the maxim *jus* " *superveniens auctori accrescit successori*, that this result is to " be obtained; though the defender seems to misapprehend the " particular application of that rule. The *pursuer* is the *suc-* " *cessor* here; and the title infeftment, which came into her " author's person, accresces, if that be necessary, to *her title* by " the *onerous contract* in her favour. But the Lord Ordinary " thinks, that the point here rests on a broader and clearer " principle. The trust was expressly constituted for James " Mc Pherson, as the first heir of entail; and, as it was quite " explicit as to the entail referred to, and the title to be given, " as soon as lands should be acquired, he was entitled to " act on the faith of such a title being vested in him when the " trust should be fully executed, and to contract and provide " accordingly, in the exercise of the power which any entail *to* " *be* made *must* confer on him; and he having done so, and subse- " quently become vested in the lands in question, it is the same

" case as if he had then made the same settlement with express " reference to the particular lands. It is a much clearer case in " this point than that of Houston *v.* Stewart Nicholson, January " 28, 1756; for there the money appointed to be laid out on " land to be entailed, *had not been laid out* in the *lifetime* of the " granter of the provision; and the Lord Ordinary cannot think " that, *in this question*, it can possibly make any difference that " the bond was here vested in trust for the heir's behoof.

" III. The question whether the rents and profits of the " lands of Fairburn purchased and held by the executors of the " will of Mr. Mc Pherson, the elder, and generally, whether " the personal funds and estate carried by that will, and the " subsequent testament regarding the personal effects in Scot- " land, are effectually made subject to the provisions in the " marriage-contract, is, in the Lord Ordinary's opinion, a ques- " tion of very great difficulty; and he must confess, that in the " course of his study of it, his impressions have occasionally " varied. There is a specialty in relation to the funds, which " stood, at the commencement of this process, invested in the " lands of Fairburn, to which it is necessary to pay particular " attention. But the general question, as to the whole personal " estate, is greatly involved with the principles which must " regulate that point.

" The disposal of this personal property rests, in the first " instance, on the will dated June 7th, 1793. That deed " narrates and refers to the *entail* of the Scotch estates, *which* " *the entailer had executed in One thousand seven hundred and* " *eighty-nine;* and it professes to dispose of his whole other " property. The material clause, after the special legacies, is " in these words:—He requests his executors ' to consolidate " ' into one fund the whole of my fortune and moveables, *which* " ' *fund they are to lay out in purchasing lands in Scotland, to* " ' *be entailed upon the series of heirs specified in the bond and* " ' *deed of entail already mentioned,* according to the strict

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" 'forms of the law of Scotland.' The executors, at an early " period, purchased the lands of Fairburn; and Mr. James " Mc Pherson, the first heir, having been advised, as it should " seem, that though the destination to *him* was clear, there was " such imperfection in the appointment concerning the strict " entail to be executed, in consequence of that entail, 1789, " having been superseded by the entail 1795, as to entitle him " to disregard it, took measures for making up a title in his " own person by adjudication, and by certain proceedings " obtained a decree of this Court in absence, and completed a " title by infeftment in fee-simple. An action of reduction and " declarator was subsequently brought by two of the executors. " In that process the late Lord Meadowbank found, that the " entail to be executed must be in favour of the heirs called by " the entail 1795, and that it must be an entail containing " simply the ordinary fetters of an entail against altering the " succession, contracting debt or alienating, as authorized by " the 'Act 1685,' but finds no sufficient warrant for them to " 'adopt all the various powers and conditions contained in the " 'deed of tailzie, 1795;' and he reduced the decree, and the " titles made up by James Mc Pherson. The Court recalled " that interlocutor, and decerned in the rescissory conclusions " of the reduction; but found that James Mc Pherson, as the " surviving disponee, *was not debarred from selling the lands* " for the purposes of the trust, but that he was bound to " execute an entail of them free of all incumbrances, or of other " lands to be purchased with the price, in favour of the heirs of " the entail 1789, under the ordinary fetters of a strict entail " against altering, contracting debt, or alienating; and they " subsequently approved of a draft of such clauses, framed in " the general terms referred to.

" That judgment may perhaps be *res judicata* among the " heirs of entail, though no entail was executed, and though in " a question with the pursuer, the effect of it is to be con-

" sidered. If it were not for the terms of it, the Lord Ordinary " must confess, that he should have doubted the *competency* of " the executors *to purchase lands, and hold them in their own* " *persons, without executing an entail,* and afterwards to sell " them, so as to keep up the trust indefinitely; and he parti- " cularly doubts how far the Court, if *the rights and interests of* " *the present pursuer* had then been put in their view, would " have held that the lands of Fairburn, then held to stand in " the executors ready to be entailed, if, when they were so " entailed, her right by the marriage-contract would have been " legally secured over them, could be sold by the executors, *to* " *the effect of destroying any right in her.* But, as the Court " did determine that there was power to sell them, the legality " of a sale may not be questionable, and the question remain- " ing must be whether the pursuer's rights were thereby effec- " tually impaired.

" It seems to be assumed by the defender, that, when Lord " Meadowbank expressly, but the Court *by implication only,* " found that there was no warrant for inserting in the entail all " the particular clauses of the entail 1795 or 1789, it must be " inferred, that the meaning and effect of this was, to exclude " the *power* of the heir *to make a provision for his wife,* as " reserved by both those entails. The Lord Ordinary has great " doubt, whether it was in the contemplation of the Court, that " their findings should have any such effect. The meaning " appears to him to have been, that there was no warrant to " make the entail *stricter* than the ordinary clauses would " render it, and that the various *more astringent* clauses in the " entail 1789, should not be adopted. But, as to the power of " the heir to provide for his wife, he doubts much, whether it " was at all in their contemplation *to decide anything concern-* " *ing it.* The pursuer was *no party* to the proceedings, and her " rights were never considered.

" This is a matter which may affect all the personal estate,

" and it is important. But one thing the Lord Ordinary holds " to be clear matter of law, viz., that an entail in the terms con- " templated by the Court, *would not have excluded the terce.* " He sees that there is some discussion about this in the " papers; but he holds it to be a clear and settled point. If, " therefore, an entail of the lands of Fairburn had been exe- " cuted in those terms, and Mr. Mc Pherson had been infeft on " it, it is plain, that the pursuer must *either* have received " implement of the *mitigated* provision in her contract, one- " *fourth* of the free rents, according to the evident intention of " the maker of all the deeds, or otherwise her *terce* would not " have been barred, and she would have been entitled to a life- " rent of one-*third* of the lands by locality. How far she can " be placed in a *worse* condition by the trustees not executing " the entail, though Mr. Mc Pherson survived the decree many " years, requires serious consideration.

" But now, it is to be observed, that there is nothing in the " clause of the will 1793 to warrant the trustees to accumulate, " in their own hands, the interest of the personal estate when " realized. And accordingly, the Lord Ordinary understands " that the deed has all along been so construed; that the late " Mr. Mc Pherson received all the rents of Fairburn from the " date of the purchase till *his own death;* that after his death " the whole rents were uplifted *by the defender;* that, since the " lands were sold, a fourth part of the price has been consigned " in the British Linen Company, to await the issue of the " present question, and *that the remainder of the interest has* " *been uplifted by the defender as the heir of entail.*

" The case, therefore, is, that during Mr. Mc Pherson's life, " there was an *existing heritable estate purchased with the exe-* " *cutry funds* of the whole annualrents and profits of which he " was in the actual possession and enjoyment till the day of his " death; and that, since his death, the defender has been in " the possession and enjoyment of the rents of *that estate,* as

" heir of entail; and since the lands were sold, *pendenti pro-*
" *cessu*, of the interest of the price, subject only to what is
" reserved to meet the claim of the pursuer. It is very clear to
" the Lord Ordinary, that, *so far as Mr. Mc Pherson had the*
" *power*, one-fourth of the rents of Fairburn, and of the interest
" of the price, as the *surrogatum* for the estate, as well as of the
" interest of any personal funds in the hands of the executors,
" *were provided* to the pursuer by her marriage-contract. The
" question, therefore, is, whether, according to a right construc-
" tion of the testator's deeds, James Mc Pherson had power to
" make that provision.

" The Lord Ordinary is sensible that there is great diffi-
" culty in this point. He does not think the pursuer's argu-
" ment well founded, which is derived from her husband's
" infeftment on the fee-simple title, not singly, because that
" title stands reduced, but specially in respect that it *had no*
" *existence at the date of the marriage-contract;* and, therefore,
" whether it was absolutely null or not, in a question with third
" parties, who might have contracted while it stood unreduced,
" the pursuer, not having contracted on the faith of it, cannot
" have any benefit by a title, which was reduced, and ceased to
" exist, before her husband's death. He sees also, that there
" is, of course, no room for a claim of terce literally, as there
" *might* have been, *if an entail of Fairburn had been executed*, in
" the terms of the interlocutor of the Court, and if Mr. Mc
" Pherson had been infeft in such an entail. And, from the
" peculiar nature of the judgment, and the indefinite terms of
" the will, there is great difficulty in finding satisfactory legal
" data for doing that which is truly the justice of the case, viz.,
" putting the pursuer in the same position, *as if the lands had*
" *actually been entailed*, with a power of making provision for
" wives, such as the testator contemplated in both the entails
" which he himself executed.

" Nevertheless, the Lord Ordinary cannot think the difficulty

" insuperable. The funds were left for the sole purpose of being " laid out on lands to be entailed. The Lord Ordinary has " already indicated a doubt, how far the executors had power " to *purchase lands* for any *other* purpose. At any rate, lands " were purchased, which *might* have been entailed, and Mr. Mc " Pherson had the enjoyment of them during his whole life. " The Court found that the entail to be executed must be to " the heirs of the entail 1789, thereby clearly recognising that " deed as a part of the will of the testator. They found, indeed, " that there was no warrant for requiring the entail to contain " all the clauses, either of that entail, or of the entail 1795; " and the Lord Ordinary sees the difficulty which this raises in " the way of the pursuer's claim. It is what influences him in " reporting the cause without a judgment. But, as it is impos- " sible to determine anything regarding the marriage-contract, " on the supposition that the testator, in so settling his personal " estate, could intend, that by the entail to be executed, or " under the virtual trust to be kept up until it should be exe- " cuted, the heir in actual possession of the rents or proceeds, " should have *no power* of providing his wife in a liferent right, " affecting *either*, it appears to him that, if there be law for " extending, on equitable principles, the power for this purpose " given by a testator in entails *executed by himself* to *other funds* " plainly intended to be given as adjuncts, and in subserviency " to such entails, the equity of the present case is, that the " onerous provision here made should be sustained to the " limited extent of the fourth part of the free produce of the " executry-fund, till an entail shall be made, and of the rents of " any lands which may be hereafter entailed.

" The decision in the case of Houston *v.* Stewart Nicholson, " January 28, 1756, does afford a principle for such a construc- " tion. For in that case, the *only power* was given in the " entail of the *lands actually entailed*; and by the *words* it was " expressly *limited* to a liferent 'out of the *foresaid estate.*'

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" All the argument, therefore, which is rested on similar words " in the present case is answered, in point of principle, by the " equitable construction which was there applied. For though " the annuities which were conveyed were given for the purpose " of being laid out in the purchase of lands to be annexed to " the entailed estate under the conditions of the entail, *no lands* " *had been purchased, or in fact so annexed;* and nevertheless " the Court found, that a provision of a *third* part of the pro- " duce of those annuities made by the heir in possession in her " marriage-contract, was effectual. There are differences be- " tween that case and the present, chiefly arising from the diffi- " culty created as to the *measure* of the power by the judgment " of the Court in the former cause. But the question is, whe- " ther there is any difference in the *principle* of the thing. If " there is not, *some* equitable measure must be found. In some " respects, especially as to *Fairburn* and its price, the equity is " stronger in the present case that it was in the case of Houston. " But, in general, the Lord Ordinary is of opinion, that Mr. " Mc Pherson was fully warranted to make the settlement on " the pursuer which he did make in regard to this fund, and " that it ought to receive effect upon the presumed will of the " testator, by reference to this deed of entail.

" There are other examples in which provisions granted by " an heir of entail have been sustained, although it was after- " wards found, that he was not *in titulo* to make them. See " February 11, 1829, Kennedy *v.* Kennedy. That was on the " Act 1695, as to apparent heirs, and may not be exactly " applicable to the present question. It only shows that an " actual and valid infeftment in the person of the heir is not " always necessary to the effectual exercise of such a power.

" On the whole, the Lord Ordinary is strongly inclined to " think, that the pursuer's claim to one-fourth of the free rents " of Fairburn, while these lands were held by the executors " after her husband's death; to one-fourth of the free interest

" of the price since obtained; and to one-fourth of the free " rents of any lands which may be hereafter purchased and " entailed, ought to be sustained. And he farther thinks that " the same rule ought to be applied to any other personal funds " in the hands of the executors.

" IV. The second general question in this case, which relates " to the rule by which the *amount* or *extent* of the pursuer's " annuity, whether it shall hold to be well provided, is to be " determined, is also attended with difficulty. But the Lord " Ordinary will express the view which he has of the different " points, very shortly.

" (1.) He is of opinion, that as to the estate of Belleville, " and the lands purchased with the proceeds of the Blairgowrie " bond, her right is to have a fixed annuity, equal to one-fourth " of the free rents of those lands, as they stood at the death of " James Mc Pherson, the heir. If this depended on the entail " of 1789, there could be no doubt of it. But the Lord Ordinary " conceives, that, in right construction, the clause of the entail " 1795 has precisely the same effect. The clause in the first " deed, apparently drawn in London, is more anxiously ex- " pressed in the particular points. But, though the *style* of the " second, prepared in Scotland by an eminent man of business, " is somewhat different, and, in the last part of it, seems to " have been intended to simplify and render more consonant to " the true intention what was perplexed and irrational in the " former, it is in the main point not materially different in its " substance. The power is, to provide their wives, &c., 'in an " 'annuity not exceeding the *fourth* part of the *free rents of the* " '*said estate*, after deducting former liferents,' &c. If this " clause stood simply on these words, the Lord Ordinary con- " ceives, that it would be construed to refer to the free rents, as " they might stand *at the death* of the *granter* of the provision. " For, *for where there is no locality* permitted, it could never be " presumed that the entailer meant to create so harassing a

" species of right as that the annuitant, on the one hand, or the " heir succeeding on the other, should be entitled *in every year* " to require a strict accounting of all the rents or *produce* of the " land, before the anuuity could be paid. It would be a hard " state of things on both sides, but especially on her's, whose " *aliment* depended on it. But the clauses which follow really " seem to make it clear that this *could* not be the intention.— " 'So that subsequent annuities shall not *exceed* a fourth part " 'of the *surplus rents*, but *may increase* proportionally, as the " '*former annuities* and *debts* shall cease to be paid off.' *In-* " *crease* from *what?* Clearly not above the *free* rents in *every* " *year*. That would have no meaning, because the increase " would follow of course on the ceasing of the burdens, from " the very nature of the right. It *could* only mean an *increase* " above the *surplus rents*, as these might stand when the " annuity came into operation, that is, at *the testator's death*. " That being taken as the measure of surplus rents, which " the annuity *should not exceed* in the first instance, an *increase* " is allowed to take place when *former annuities* and other " similar debts should fall in or be paid up. In this view the " clause is clear and intelligible; but in any other it is diffi- " cult to see what purpose it could have been intended to " answer.

"The defender comments at great length on certain clauses " of the marriage-contract, as implying, on the part of James " Mc Pherson, an intention to provide the annuity on a different " principle,—and it is really not improbable, that he or the " maker of the deed had some such idea. But the material " part of the deed is perfectly clear and simple. He binds him- " self and the heirs of entail 'to content and pay the said Miss " 'Maria Sophia Craigie yearly during all the days of her life " 'after his death, in case she shall happen to survive him, *a* " '*free annuity equal to one-fourth part of the free annual rents,* " '*issues, and produce of the whole tailzied estate* of the said

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"'James Mc Pherson, as after described.' Whatever, there-
"fore, may be the effect of the subsequent clauses, and whe-
"ther they may be consistent with the power given or not, the
"pursuer cannot lose her right thus bestowed in precise con-
"sistency with the terms of the entail. The clause which
"follows relates to the produce of the *personal estate* which
"was necessarily in a different situation, and in so far as some
"of the clauses might be directed to vest a real right in the
"lands, or to entitle the annuitant to uplift the rents, name a
"factor, &c., with reference to the entailed estate, such clauses
"ought to be construed as merely intended for the pursuer's
"*security*, and ought not to affect the validity or effect of the
"right itself, according to its terms, and the nature of the
"power given by the entail.

"The Lord Ordinary will only further observe, that, when
"the defender speaks of it being a very easy matter to settle
"a claim for an annuity on her principle, the proposition is far
"from obvious. Not to speak of rents allowed to fall in arrear,
"the only *compulsitor* being in the heir's hands, what is to be
"made of a yearly accounting for the *produce* of all the land,
"which the heir may choose to take in her own hands? As it
"is, there is a question about a home farm. But what if the
"heir should let the whole, or a great part of the estate, fall out
"of lease, and keep it in her own hands,—a thing not at all
"uncommon, both in the Highlands and other parts of Scot-
"land? It would be a very distressing position to put the
"widow in, that she could get no payment of her annuity, not
"only till the heir chose to realize its produce, and fix its value,
"but till a comparative accounting should take place upon all
"the *expenditure* and *profit* in *every* year. The Lord Ordinary
"cannot presume, that this was the meaning of the entailer,
"and neither does he think that it is the fair import of the
"marriage-settlement.

"(2.) The clause of the marriage-contract relative to the

"other funds is differently expressed. It necessarily was so; "because the produce of that fund could not be determined by "the date of Mr. Mc Pherson's death. It might vary from "time to time before lands were purchased and entailed, and it "would necessarily be changed when a purchase and entail were "effected. In this part of the case, therefore, the Lord Ordi- "nary will simply state, that if the Court should find that the "pursuer's claim is well founded generally to a fourth part of "the free produce of these funds, his opinion is, that the right "must be measured by the interest or produce coming into the "hands of the trustees in each year from the death of James "Mc Pherson, until the capital should be laid out as directed "and an entail executed; and that then the annuity must be "fixed by the free rent of the lands when they come into the "possession of the heir of entail. Though there is a difference "in this result from that in the other case, it is only a difference "*necessarily* arising out of the nature of the whole settlements "of the entailer, and he does not think it at all legally incon- "sistent.

"V. Various questions are discussed as to the deductions to "be made before determining what is the *free* rental. In this "part of the case, a good deal depends upon the rule to be "adopted as to the nature of the annuity. The defender "assumes her own construction. The Lord Ordinary will, "therefore, say little on these points.

"(1.) The defender claims a deduction for *improvements*. "This must be out of the case, if the annuity shall be fixed at "the death. But the statement of the claim shows how much "the pursuer's annuity would be made to depend on the arbi- "trary discretion of the defender, and what a perplexing account- "ing it would involve, if the defender's construction were "adopted.

"(2.) A deduction is claimed for the expense of keeping up "an *embankment* against the river Spey. The Lord Ordinary

" will not say that this may not require consideration on any " construction. But, at present, he does not see clearly why " such a deduction should be admitted, any more than on " account of keeping up farm-steadings, fences, &c. The " defender says, that if the land were let to a tenant, taking " him bound to keep up the embankment, the pursuer would " bear her share of this in the diminished rent. That may be " true; but the answer seems to be, that the proprietor will act " for her own interest in that matter, having a right to three- " fourths of the free-rent, and that, if she takes the burden on " herself, it is her own act, and she cannot throw any part of it " on the annuitant. Yet the point may be doubtful.

" (3.) The defender claims deduction on account of the repairs " of the *church*. This supposes that there is to be no fixed " annuity. But, taking it otherwise, the case of *Anstruther*, " May 14, 1823, seems to be against the defender, that being " the case of a liferent by *locality*.

" (4.) The defender claims abatement for *unrecovered arrears* " This brings out the effect of the defender's construction. The " pursuer is to suffer abatement in every *year*, having no power " to recover the rents, or to control the management; and it is " to be observed, that even the power given to her contingently " to appoint a factor could not be exercised till she could show " that the heir had *refused* to pay rents *actually recovered*.

" V. The defender claims deduction for a salary for a " factor generally; and in support of this she says that she is " seeking no advantage, but only that the estate *should be* " *treated as if it were placed under sequestration* for the behoof " of all parties. The Lord Ordinary can never think that it " was the intention of the entailer that the estate should be so " treated. And, in general, he sees no ground for this claim " on any construction.

" VI. A question is raised as to the mansion house and " policy. The Lord Ordinary does not understand the pursuer

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" to make any claim to the mansion-house, or to the policy or " pleasure-ground properly understood. In so far as she does " so, he is clearly of opinion, that the claim is unfounded, and " that they cannot be taken into account at all, at least if the " annuity is to be fixed, and, he rather thinks, even on the " other construction. But the pursuer says there is a home " farm which may be of considerable extent; and the Lord " Ordinary does not see any good ground for excluding either " a home farm *producing agricultural crops*, or land *let in grass*, " or *pasture* for the *sale* of cattle.

" VII. A serious question arises with regard to extensive " grounds let on account of the *game*. There may seem to be " difficulty in this from the newness of the practice. But at " present the Lord Ordinary is not satisfied with the defender's " argument for excluding it. The ground *is let for a rent*. As " it is so, it is no good argument to say that the proprietor " *may not let it*, but leave it to go to waste unproductive. The " practice of letting such ground, and the profitable returns " obtained for it, have altered the nature of such property. " The pursuer has a right to one-fourth of *the rent* of *all* the " land which can be *profitably let*; and if the proprietor keeps " it to herself, that should not alter the pursuer's right. If the " defender's construction is to be taken, and if *every year's* rent " is to be taken separately, it will not be easy to hold that the " *actual rent of the land part of the estate*, perhaps amounting " to hundreds of pounds, is to contribute no benefit to the " pursuer. But, even if the estimate is to be made at once, for " a fixed annuity, it does not appear that such land can be " justly excluded from the reckoning. There may indeed be " difficulty as to the mode of making the estimate in that case, " as in all cases of rent, which is precarious from the nature of " the subject.

" VIII. Finally, there is a question as to the time, when " the *first term's* payment shall become due. If the entail

" 1789 were to regulate this, there could be no doubt about it; " and though the entailed estate depends on the deed 1795, " that, in the Lord Ordinary's view, ought to be construed as " having the same effect. But the defender says that the pur- " suer is only entitled to her annuity *how* and *when* the defender " *recovers* the rents. This may be a necessary consequence of " her construction; but the Lord Ordinary cannot enter into " it. One thing he should think clear, that, if the pursuer " were not entitled to a payment of her annuity within some " short period after her husband's death, she must be entitled " to some reasonable *aliment* until it did become payable."

Before any judgment had been given in the case, the lands of Fairburn were sold by the appellant, and 5000*l.*, one-fourth of the price, was consigned in a bank to abide the result of the respondent's claim.

On the 24th of May, 1839, the Court pronounced the following interlocutor:—" Find the defender liable to the " pursuer in a free liferent annuity, equal to one-fourth part " of the free rents, issues, and produce of the entailed estate of " Belleville, comprehending the lands entailed by the late " James Mc Pherson, senior, of Belleville, and also the lands " of Strone, and others, acquired and entailed under, and in " virtue of, a deed of trust, executed on the 19th day of Sep- " tember, 1795, by the said James Mc Pherson, in favour of " John Mackenzie, esquire, of the Inner Temple, London, " counsellor-at-law; William Duncan, esquire, of Philpot " Lane, in the city of London, merchant; and James Gibson, " Writer to the Signet: Find that the said annuity must be " estimated according to the amount of the rents of the said " lands, as the same stood at the death of the late James Mc " Pherson, second of Belleville, the husband of the pursuer, " and must be equal to, but not exceed a fourth part of the " free rents of the said estate, as they then stood, after deduct- " ing former liferents, if any, interest of entailer's debts, feu

" and teind duties, cesses, land taxes, minister's stipend, and " any other burden affecting the same; but to increase pro- " portionally as former annuities and debts affecting said " estate, shall cease and be paid off: Find the defender liable " to the pursuer in an additional liferent annuity, equal to one- " fourth part of the free annual rents, profits, interest, and " produce of the whole free trust funds and property or exe- " cutry, after deduction of debts of James Mc Pherson, senior, " the first of Belleville, including the estate of Fairburn, until " the same was sold by the defender, and the price thereof " after the same was sold, as the said annualrents, profits, " interest, and produce, accrued, or may yet accrue, from the " date of the death of the said James Mc Pherson, the second " of Belleville, until the said trust funds or executry shall be " invested in conformity with the provisions of the deeds " relative thereto, and thereafter, as the rents of the lands " which may be purchased with the said price, and other exe- " cutry or trust funds, and entailed in terms of said deeds, " may stand at the time when they come into the possession " of the heir of entail: Find the said annuities were and are " payable half yearly, at two terms in the year, Whitsunday " and Martinmas, by equal portions, beginning the first half " year's payment at the term of Whitsunday, 1833, being the " first term of Whitsunday or Martinmas after the death of " the said James Mc Pherson, for the half year immediately " preceding, and thereafter, at the terms of Whitsunday and " Martinmas, in equal portions, during the lifetime of the " pursuer, with the legal interest thereof from the time the " same respectively fell or may fall due, and till paid, such " annuities and interest thereof being payable by the defender " to the pursuer, from the said term of Whitsunday, 1833, " only during the defender's lifetime, and that under deduc- " tion of any sum or sums of money she can instruct already " to have paid to account thereof. But reserving all questions

" in regard to the rate of interest arising out of the consigna-
" tion in bank of part of the price of Fairburn: Find, that
" in estimating the amount of the year's rent as at the death
" of the late James Mc Pherson, the pursuer's husband,
" according to which the said annuity falls to be fixed, no rent
" or value must be computed for the mansion-house, or for
" the policy or pleasure-ground thereto attached, but that the
" policy cannot be held to include any farm carried on by the
" proprietor for profit, whether the same was arable or pas-
" ture: Find, that in estimating the amount of said annuity
" and additional annuity, regard must be had and computation
" made of rents actually received for the game and fishings on
" the said lands: Find, that in ascertaining the amount of the
" said annuity and additional annuity, deduction must be made
" from the rents of the entailed estate, of the interest payable
" on so much of the alleged improvement debt as may be
" found in the proceedings now in dependence, to have been
" validly imposed a burden on the said lands or heirs of entail
" succeeding thereto, in terms of the Act 10 Geo. III., cap. 51.
" But, find, that in estimating the said annuity and additional
" annuity, no deduction falls to be made on account of the
" expense of constructing and repairing embankments against
" the river Spey, or on account of the repairs, annual or occa-
" sional, of the parish-church, or on account of any salary or
" allowance to a factor or collector of rents."

A discussion then took place in regard to the amount of rent for the right of shooting game, which should be taken into account in fixing the respondent's annuity; and on the 15th February, 1843, the Court pronounced the following interlocutor:—" Find, that, in estimating the rents, issues, and produce
" of the lands mentioned in the interlocutor of the Court, of
" date May 24, 1839, in order to fix the one-fourth, under the
" deductions stated in said interlocutor, as the liferent annuity
" payable to the pursuer, the amount of the sum to be taken

"as the rent of the game on the said estate is to be of rent "received prior to the death of James Mc Pherson; and is, "by the consent of the pursuer, to be the average of the rents "received for the game during the year in which the said "James Mc Pherson died, and the five preceding years."

Subsequently an interlocutor was pronounced, carrying out the findings in the two interlocutors which have been quoted.

The appeal was taken against these different interlocutors.

*Mr. Stuart* and *Mr. Anderson* for the Appellant.

I. It is not disputed that the respondent has a legal provision out of those lands which have been actually entailed by the entailer himself. The extent of that provision is another question. But the respondent has no such provision out of that part of the entailer's estate which was not so entailed, and is not even yet entailed; even assuming that her husband would have had power to grant her provision, if the entail had been executed in his lifetime. The obligation given by the contract of marriage is upon the heirs and successors of the husband, and "also the "heirs of tailzie succeeding him in the tailzied estate" of his father, to pay her an annuity. The appellant is neither heir nor successor of the husband, neither is she his heir of entail in regard to lands purchased with the residuary estate of the entailer upon trust to be entailed no doubt, but which never have been entailed, and which, at his death, were vested in the husband, solely in his character of surviving trustee. Still less is she his heir of entail in regard to that part of the residuary estate which retained its original pecuniary and personal nature. In regard to both of these parts of the estate, the husband never attained the character of heir of entail, so as to entitle him to grant any obligation in that character, which could bind those who should attain it after his death. He had a *jus crediti* against the executors of the entailer, but he had not in his person the rights of a *proprietor*, any more than if he had been

a purchaser having a right to adjudge in implement of the contract of sale.

A power to create a burden upon lands cannot be created by any one not infeft in them. It may be very true, that the respondent's husband in his lifetime would have been entitled to the income arising from the whole estate, whether invested in land or not, and whether that land were entailed or not, upon the authority of *Stair* 2 *Wil. & Sh.* 414. Or that, if he had been infeft as heir of entail, he might have given a provision not only to his own wife, but to the wife of his apparent heir, which is all that was decided in *Houston* v. *Nicholson*, *Mor.* 2338. But neither of these cases are of any authority to show that a party uninfeft having a life interest in trust estate, is entitled to create a charge upon the estate to subsist after his death.

[*Lord Cottenham.*—Neither of these cases is of any authority unless you fail in establishing that the lands were not subject to the power. In the view *Lord Moncrieff* took of the power, they have application.]

II. But even if the entail had been executed in the husband's lifetime, it would not have authorized the provision given by the contract of marriage. The direction in the will was to invest the estate in the purchase of lands to be entailed on the same series of heirs as that contained in the deed of 1789, but not by a deed in the same terms or containing the same powers. On the contrary, the decree of the Court definitively fixed, that according to the true construction of the will, the entail to be executed, was an ordinary one, with the fetters prescribed by the Act 1685. This would not embrace a power to provide widows; so that even if the husband had at any time possessed a character which would have entitled him to impose an obligation upon the heirs of entail, he could not have imposed the obligation of this provision upon them, as the entail, if it had been executed, would not have given him power to grant it.

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[*Lord Cottenham.*—Was the respondent a party to the action in which that decree was made?—If not it cannot bind her.]

She was not, but her husband was, who claimed the power to insert the jointure in the contract of marriage.

[*Lord Cottenham.*—At the time of that suit, the wife had an interest in it, because her contract of marriage expressly gave her a jointure over Fairburn. If, therefore, the husband had the power to make the jointure, he was bound to execute it.]

There was no onerosity as against the testator, and those succeeding to him, which could entitle the respondent to this provision, or upon which to found an equity in her favour. Her rights, therefore, must depend upon the strict construction of the power and the deed executing it. All that the will prescribes is, that the property covered by it is "to be entailed "upon the series of heirs specified in the bond and deed of "tailzie already mentioned," *i. e.* the deed of 1789. Although the entail is to be upon the same series of heirs, it does not follow that it is to be with the same powers to jointure. An entail with the usual fetters would amply satisfy the injunction of the will.

Even if this were not so, the provision cannot affect any estate but that which is embraced by the entail 1795. The obligation in the contract is to give the respondent an annuity, "as permitted by the entail of 1795." Construing this strictly, it can only affect the lands covered by the entail of 1795; but the property which had not been invested at the date of that deed, was not subject to its fetters, nor to the powers given by it; that property was to be entailed under the direction of the will by an ordinary entail, without mention of powers to jointure. The effect of the entail of 1795 might very well be to supersede and revoke the entail of 1789, in regard to the lands embraced by it, but it could not have any effect in regard to the property not expressly embraced by it, so as to

bring that property within its operation. Notwithstanding the deed of 1795, this property continued subject to the directions in the will, which, as already observed, were that it should be invested in lands to be entailed upon the same series of heirs as in the entail of 1789, but without any mention of what powers were to be enjoyed by the heirs. If this be so, then, as the entail of 1795 does not embrace that part of the estate which was not then invested in land, and out of which Fairburn was subsequently purchased, the respondent's husband had no power to grant her a provision out of these lands; and the contract did not, in fact, give such a provision, for it is in terms limited to a provision "permitted by and in terms of the entail dated "19th September, 1795."

If the appellant be right in this, his argument will apply *a fortiori* to that part of the estate covered by the will, which has never yet been invested in land.

III. The effect of the interlocutor is to give the respondent a fixed annual sum equal to one-fourth of the free rents, as at the date of her husband's death, but there is no authority for this; the annuity is to vary, *de anno in annum*, according to the amount of rent actually levied from the occupiers. The power in the entail is to grant an annuity not exceeding a fourth-part of the free rents. There is nothing in the terms used to show that the annuity is to be fixed according to the free rents in any given year; and the provision given by the husband, in execution of the power, is an annuity "equal to one-fourth part," not of the rents merely, but "of the annual rents," that is, of the rents as annually paid. This construction, in regard to the lands entailed, is confirmed by the terms of the provision in regard to that part of the estate which had not been invested in entailed lands. The produce of this part of the estate must necessarily have varied from time to time, according to the variation of its investment; it was impossible, therefore, for the provision out of it to be fixed in amount. Further, the lands are conveyed

in security of the annuity, and power is given "to uplift the rents "to the extent aforesaid." Not only so, but power is given to the widow to concur with the heir in possession, in appointing a factor to levy rents, who should be bound to account to her for one-fourth "of the free annual proceeds collected by him, "and that half-yearly and termly as the said rents and proceeds "come into his hands, in payment and satisfaction" of the annuity. If the annuity was to be a fixed sum, how could a fluctuating payment be a satisfaction of it. The fourth of the money actually received might fall greatly short of the fixed sum. This construction of what the husband actually did, is assisted, moreover, by the terms of the deeds giving him power to do it. The entail of 1789 is express in fixing that the time at which the fourth of the rents is to be calculated, is to be the death of the heir giving the annuity, showing that the maker of the entail had the subject in view, and knew how to express himself upon it; but the deed of 1795 drops this, and leaves the calculation to be an annual one, and so James Mc Pherson read and exercised the power.

IV. In computing the respondent's annuity a proportion of the expense annually incurred in maintaining the embankment of the river Spey should be deducted. In truth the rent paid for that part of the estate is not strictly a return for the produce of the land, but for the money thus expended by the landlord, and without which expenditure the tenant would be driven to make it himself. The expense, ranging from 80*l.* to 120*l.*, per annum, is not an expense of management, it is indispensable for the actual preservation of the *corpus* of the land; without it, the river, one very rapid and stormy in its current, would break in and lay everything waste. The appellant might in his management let these lands with an obligation on the tenant to maintain the embankment, receiving in return a deduction from the rent otherwise payable. If so, the free rent could only be taken after allowing for this deduction, and it can-

not make any difference on the rights of the present parties that the landlord has himself undertaken the expense. The power in the entail specifies "any other burden" affecting the lands. The expense of keeping up the lands themselves is surely a burden affecting them, if without it they would go to waste and destruction.

V. The respondent cannot be entitled to have the money paid for the right to shoot game included in the account of the free rent. It is not rent in any sense of the term—it is a sum paid in gross for the temporary exercise of a personal franchise. Whatever could be ascertained to be a fair occupation-rent may be the subject of the annuity; but how could an occupation-rent be fixed in the present instance? by what standard could the value of this franchise be measured? If a proprietor retains lands in his possession, the worth of them to him may be ascertained in that way as easily as if he had let them to others. But if a proprietor does not choose either to grant the right of shooting to others, or to exercise it himself, or if the proprietor be like the appellant, a female, who does not choose to have the privacy of her estate encroached upon by communicating this franchise to others, of what value is the right to him or her, or of what value can it be said that it ought to be?

*The Lord Advocate* and *Mr. Bethel* for the Respondent.

I. Whatever defect in the title of James Mc Pherson to grant the respondent the provision in her contract of marriage, there might be at the date of that deed, was remedied by what occurred subsequently. With regard to the proceeds of the Blairgowrie bond, that was not only invested in land, but the land was entailed according to the directions of the will, in his lifetime, and he was infeft under the entail. From that time he was unquestionably *in titulo* to grant the provision, and the title he had thus acquired accresced to the respondent upon the maxim *jus superveniens successori accrescit*. The same maxim

will likewise apply so as to make the provision effectual in regard to the lands of Fairburn. It is very true that these lands had not like the others been purchased at the date of the contract, and that they have never been entailed; but from the time they were purchased and vested in the trustees by infeftment, James Mc Pherson, as having the beneficial interest in the trust held the lands as proprietor through the infeftment of the trustees, with all the rights to which a proprietor is entitled, and thereby acquired a full title to grant the respondent's provision, which title, as in the other case, accresced to the respondent so as to validate the previously-created provision.

But, in truth, there was no necessity for any infeftment in James Mc Pherson, in order to validate the provision, or that any investment in lands at all should have been made. If the estate had all continued personal, he would still have been entitled to grant the provision on the authority of Houston *v.* Nicolson, *Mor.* 2338, where the right to grant a provision out of the profits of money directed to be invested in the purchase of lands to be entailed was expressly sustained, upon the principle that there being no doubt of the intention, the case was to be viewed as if the intention had been carried into execution. Moreover, in the present instance, the provision to widows does not require to be made a real charge upon lands or to affect them in any way; it is expressly limited by the power to a personal obligation upon the heirs.

II. Assuming the provision to have been granted in a form that would make it binding, there can be little question of the power of the granter. The fair and reasonable construction of the will is, that the testator intended the entail thereby directed to be made, to be similar in its terms to the one he had himself made, which expressly gave power to grant this provision. It can hardly be supposed, in the absence of any express terms requiring that effect, that he would desire that his estates should be held by the same heirs upon two different entails containing

different powers. When the entail of 1795 revoked by necessary implication the entail of 1789, it substituted itself for the deed of 1789 in the direction of the will to invest the estate in the purchase of lands to be entailed.

But, on the other hand, if the will did not authorize the provision, it would still be sustainable on another ground. The respondent's right to terce was no way excluded; nor was it dependant upon her husband's infeftment, Bartlett, 21st February, 1811, *F. C.* Her husband was, therefore, entitled to grant her a reasonable provision, so long as it did not exceed the terce, Cant *v.* Borthwick, *Mor.* 15554; Rose *v.* Fraser, *Mor. voce Terce App. I.* The radical right was in the husband, and that was sufficient to support the provision. Houston *v.* Nicolson goes to this, that, although land was not purchased, there was power to grant a provision out of the money directed to be entailed. In that case, the provision was sustained because of the intention, although the form prescribed by the power was a *locality*, a form applicable to lands and not to money.

But, still further, the annuity would be good under the 5 Geo. IV. cap. 87, which had passed in the lifetime of the respondent's husband. The contract of marriage, though executed prior to the Act, did not take effect until after it. It was a plain expression of intention to grant the provision; and the statute does not make it necessary that deeds granting provision should recite or refer to it.

III. It is impossible to read the contract of marriage without seeing, that the intention of James Mc Pherson was to execute the power given him by the entail in the terms and to the extent to which it was given. According to the interpretation which has been put upon powers similarly expressed, the extent of the provision is to be measured by the amount of the rents, as at the death of the heir granting the provision, Mackgill, *Mor.* 15451; Glencairn *v.* Graham, *Mor.* Heir Appar. App. I; Douglas, 15 May, 1822, *F. C.*; Rothes, 7 *Sh.* 339. Mc Donald

*v.* Lockhart, 14 *Sh.* 785. That is the general rule of construction, unless there is something in the terms of the provision expressly to the contrary, which there is not in the present case; and unless such were the rule, it would be difficult to extricate the rights of parties, for the heir in possession has, necessarily, the control over the lands, and may so manage them as greatly to impair the provision, without the possibility of the annuitant interfering, or he may disappoint the regularity of payment if there were to be a half-yearly enquiry as to its amount.

But the terms of the provision would justify the construction the respondent contends for. If a fourth of the rents as they were actually realized had been intended, there would not have been any occasion for the use of the word "*annuity;*" but the provision is of an "annuity equal to one-fourth," which must mean something different from the actual fourth itself.

IV. The deductions to which the annuity is to be subject in calculating the free rents are specified in the entail, with a conclusion of any "other burden," that is, any other burden of a nature similar to those enumerated; but the expense of the embankment is neither specified, nor is it a burden, and still less a burden similar to those specified. It is not a charge upon the rent in any way whatever, but an expense disbursed by the proprietor out of his own pocket, and very much resembling those permanent repairs which in no view could be a charge upon the annuity.

V. The entail allows a certain proportion of the revenue derived from the lands to be settled by the heirs upon their widows. An annual revenue has for many years been derived from the sale of the right to shoot game. So long as game was not allowed by law to be sold, the privilege was not one of any ascertainable value; it was strictly a personal franchise communicable by the proprietor to others, but not for any consideration of pecuniary value. But so soon as the sale of game was permitted the matter was changed. The franchise then

became a source of revenue, and its value is as capable of being ascertained as any other source of revenue; such, for instance, as the right of salmon fishing; and the Court below so decided in Sinclair *v.* Duffus, 5 *D. B. & M.* 174, where it was held that, in computing the amount of a provision by an heir of entail, money given for the right of shooting was to be taken into account.

Lord Brougham.—My Lords, this case arose upon the claim of a widow under a settlement of a person very well known in Scotland, Mr. Mc Pherson, of Belleville, in Invernesshire. The claim of the widow is, under that settlement, to a sum not exceeding one-fourth of the net clear rent—a free annuity, equal to one-fourth part of the clear annual rents, issues, and produce of the whole tailzied estate, after deducting minister's stipends, and other burthens of a similar kind, which are enumerated in the clause.

My Lords, the two questions which principally detained your lordships from giving judgment when this case was heard, and which appear to require, perhaps, further consideration, were these:—First, whether the expenses of keeping the estate clear and defended, and free from the waters of the adjoining river, and which expenses were said to be of such constant occurrence, that they might almost be reckoned an annual outgoing in the management of the estate; whether those expenses should be deducted for the purpose of ascertaining what the clear rent was, to one-fourth part of which the widow was entitled. The next question was, whether an account should be taken of the game, there being a large extent of territory let, and which was let, manifestly, for no other purpose than for shooting and sporting thereupon.

To both of those questions I shall shortly now advert, stating, that I have come to the conclusion at which Lord Moncrieff arrived, he having, at different times, no doubt felt

some difficulty in the case, and having expressed on the face of his very learned and elaborate note a degree of caution in coming to that conclusion, which, so far from weakening my confidence—and I apprehend I may say the same for your lordships—so far from weakening your confidence in the result at which he arrived, rather tends to give me greater trust in that most learned, able and diligent Judge's opinion upon this case.

He says, that he considers that this outgoing is not to be deducted from the clear rent. The argument for deducting it is this: that, suppose a lease had been granted, what they call there a tack had been granted to a tacksman, and the tenant had taken upon himself the expenses of those embankments, necessary for the preservation of the land, that would *pro tanto* have diminished the rental. The argument is put thus: suppose the expenses were 80*l.* a-year for the embankment, and the gross rent would be 280*l.* if the landlord paid for the embankment; and suppose, that by the terms of the lease the tenant was to pay for the embankment, he would deduct the 80*l.*, and the whole clear rent would only be 200*l.*, instead of 280*l.* Then, contends the appellant, the owner of the estate, "I have no right to reckon the whole 280*l.*, but only the 200*l.*" That is, neither more nor less than deducting the expense of the embankment.

Now Lord Moncrieff's answer to that appears to me perfectly conclusive. He says it may be so, if that was a bargain—it may be so, if that was the lease. But, in the first place, this is assuming that the embankment is a yearly expense, like one of the ordinary expenses to which the owner of an estate is liable in the manurance of his property. But, *non constat*, that it is a yearly expense. I look upon the expense of an embankment to be very much the reverse of an annual expense. I know a little of embankments myself, and I am perfectly aware that they are never regarded as an annual expense of the

estate—we look upon it very differently—we look upon it as an improvement of the corpus of the estate. Frequently an embankment is made, by means of which a neighbouring proprietor, a conterminous owner, is very apt to throw the whole of the water upon his adversary—an attempt which was made by those whom I succeeded in my property in the neighbourhood of Mr. Attorney-General Wallace. But the Attorney-General defended himself by a similar embankment; and so the two proprietors played with embankments upon each side of a very rapid mountain stream, till at last, as might be very easily seen, Mr. Attorney-General prevailed. And, therefore, there was not a monument erected on the shore to celebrate his victory, but there was a great hole which had been made by this very successful embanking against us, the opposite proprietor; and its goes to this day by the name of "Lawyer "Wallace's Hole;" establishing his triumph in the matter, as conclusively as it would have been, very certainly, in matter of law. That is a very constant course, and very often one party succeeds, and not only throws off the water and defends himself against the encroachment, but obtains a very considerable accession of land either from the sea, (which is the most common case,) or from the river, or from the lake.

Now what is the consequence? Is that to be deducted as a yearly expense and outgoing in the management of the property? No such thing. It is a positive improvement of a permanent nature, the benefit of which goes to the fiar; and, therefore, the burden of it ought to fall upon the fiar who enjoys the benefit. It is true that the widow will get a benefit in the proportion of one-fourth part, but she is not to pay for that embankment merely because the owner chooses to embank, and by so embanking greatly increases the value of the *corpus* of the estate.

I take, therefore, a most manifest distinction, founded on the whole view which I have taken of such a case, between

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mere ordinary outgoing on the property and the expense of an embankment, which was the expense chiefly contemplated by these proceedings.

But, then, says my Lord Moncrieff, admitting it to be an annual outgoing, admitting that they are right in saying that, if there had been a lease, and it had been a term of the lease that the lessee should pay the expense of the embankment, then the landlord would receive, therefore, so much less rent; in that case, past all doubt, the fourth part of the widow would suffer a deduction—because she is only to get a fourth part of the clear rent; and she could not come into Court and complain that 80*l.* had been allowed to the tenant, because the settlement which gives this right to the widow, assumes that the management of the estate is to be in the fiar; and if he is to retain the management of the estate, as is most justly and accurately observed by Lord Moncrieff, he is to manage it for his own benefit. Miss Mc Pherson, the present fiar, is left to manage it in the way she thinks best for her own benefit. The widow is liable to suffer if she mismanages it. She has no power to interfere. She cannot come into Court to stay her from proceeding in a way which is injurious to the widow's rights. She cannot come into Court to call upon the Court to stimulate the fiar to get more out of the land than she gets. She cannot call upon the fiar by any process of law, or in any way whatever to alter the management of the estate. So far she suffers from the management of the fiar, if it turns out to be injudicious. But precisely in the same way if the fiar chooses, as Lord Moncrieff justly observes, not to make that kind of bargain with the tenant, but herself to pay the expenses, the benefit of that, if it is to be called a benefit, accrues to the widow, just as the detriment would accrue to the widow, in the contrary case which I have supposed.

I am, therefore, of opinion with his lordship upon that ground, that this expense of the embankment—and there are

one or two others of a similar kind, factor's fees and other items—must not be deducted. It would really be too absurd to say that the salary of the steward, that is, the factor, was to be deducted before the sum was ascertained, out of which a sum not exceeding one-fourth was to go to the widow. That is still clearer even than the case of the embankment. It tends to show that every annual expense, merely because it is such, must not be taken to go to diminish the annuity.

The next point, my Lords, is with respect to the game. It no doubt was very ably and strenuously argued as a matter that ought not to be included for the benefit of the widow, that a certain tract of country was only let for the purpose of keeping so much grouse as a matter of pleasure; and that the fiar need not have let it, but might have kept it in her own hands. My Lord Moncrieff's answer to the case of the tacksman just applies to that, namely, if she had done that—if she had not let the game. If the game had been unlet, I am not called upon to say what my opinion would have been, as to whether the widow would have had a right to say, I am not to be a loser, because Miss Mc Pherson chooses to shoot instead of letting the game. I am not called upon in supporting the judgment below, and in arguing in favour of my opinion for affirming that judgment, to say what would have been the case, if the game had not been let. Because I apprehend that is not one of the matters here in dispute; but I have a very clear opinion, (though I am not called upon to give judgment upon that ground,) that the widow would be entitled even in that case. All the cases that have been decided would go to that extent.

There is the case of Sinclair *v.* Duffus, which really appears to me to take away all controversy upon this, and which appears to me to have received the consideration of all the Judges, and the consulted Judges also. The consulted Judges gave their opinion, and the Court there held, I think

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unanimously—with the exception of Lord Fullarton, who dissented from the rest of his learned brethren—that, in ascertaining the amount of provision that may be granted by an heir of entail in possession, the annual value of the game, let or unlet, is to be taken into computation.

My Lords, upon these grounds, therefore, I have no hesitation in recommending to your lordships that the judgment of the Court below be affirmed.

LORD CHANCELLOR.—My Lords, I quite concur in what my noble and learned friend has stated as the principle of this case. It appears to me also to be equally clear that the right of this widow to an annuity applies to all the estates which are matters in contest. With regard to the Belleville estate, there can be no doubt. With regard to the two other estates, the one which was purchased for the 4,600*l.* under the Blairgowrie bond, and the other which was purchased out of the residue of the testator's estate all that we have to look to is to see whether the party who executed the marriage-settlement had or had not the power so to charge those several properties. He gives her a charge of "a free annuity equal to one-fourth part of the free "annual rents, issues, and produce of the whole tailzied estate "of the said James Mc Pherson, as after (therein) described. "As also to pay her yearly, in the event foresaid, an additional "free annuity, equal to one-fourth part of the free annual profits, "rents, interest, and produce of the said James Mc Pherson's "whole estate and effects still under trust," (there is no doubt as to what that refers to,) "or to which he has succeeded or may "succeed by and through the will of his said father," that applies to the residue of the personal estate. He, therefore, by the terms of this marriage-settlement has contracted that she shall have one-fourth part of the annual profits of all those several descriptions of property.

Then having so bound himself, the only question is, had he

or had he not power so to bind the property to which he refers? As to the original property of James Mc Pherson there can be no doubt; and there can be no doubt as to the residue of the property which was directed to be laid out in land and to be entailed. If that had taken place, then under the provisions of the statute he had power to make a charge for his widow to the extent of one-fourth part of the income of that property. And whether the money was actually invested, or remained in trust to be invested, I apprehend it is quite impossible that the widow, the party to this marriage-settlement, could suffer from the omission or neglect of this party in carrying into effect the trusts of the will.

I apprehend, therefore, my Lords, that the title of the widow is clearly made out to a fourth part of the income arising from this property. I am also of opinion that the measure of that right is that which has been laid down by the learned Judges in the Court below.

Lord Campbell.—My Lords, the only point upon which I deem it necessary to add a single word to what has been urged by my noble and learned friends who have preceded me, is with respect to the game. Now this I know is a very important question in Scotland, and is a question of growing importance, because the English are so found of grouse-shooting in Scotland, that a considerable part of the Highlands of Scotland are devoted to the pleasure of the English on the 12th of August.

The earliest inhabitants of the Highland hills I fancy were the red deer; then came the black cattle; and sheep afterwards were found to be more profitable. But now the most profitable purpose to which the Highland hills can be converted, is the rearing of grouse, and the sheep are in many instances laid aside because they interfere with the eggs of the grouse in the spring; and instead of sheep, the whole territory is devoted to grouse rearing.

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Now a very important question arises,—extremely important for widows in Scotland,—whether, if they are entitled to a certain proportion of the free annual rents of a Highland estate, the sums received by way of rent for the shooting shall be included or excluded. If they were excluded, in many instances the widow would be left entirely destitute; but I can see no reason in the world why, if the produce of the ground is devoted to the feeding of grouse, the profit thence arising should not be considered the annual rent of the land, just as much as if the produce of the ground is devoted to the feeding of four-legged animals, deer, cattle, or sheep. It is a rent received substantially for the use and occupation of the land.

There are some subtleties arising from the right of shooting being considered a franchise; but when we construe a settlement of this sort, whereby a certain proportion of the annual rent is given as a provision for the widow, we must suppose that the author of the settlement is a man of sense, reason, and understanding, and that he looks to the manner in which the land is occupied and to the source from which the profits are to arise. I am clearly of opinion, therefore, upon principle, that the rent received from the right of shooting upon these moors is to be considered as part of the annual rent of the land. And I am very glad to think that we have not only principle and good sense to proceed upon, but the decided case of Sinclair *v.* Duffus, to which my noble and learned friend who first addressed your lordships, has alluded.

I concur entirely, therefore, with the great majority of the learned Judges below and with my two noble and learned friends who have preceded me, that the rent from the shooting should be included, and that the widow is entitled to one-fourth of that as much as she is entitled to the portion of the rents arising from the rest of the estate.

It is ordered and adjudged, That the said petition and appeal be, and is hereby, dismissed this House, and that the said interlocutors

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therein complained of be, and the same are, hereby affirmed, and that the said cause be remitted back to the Court of Session in Scotland, to do further therein as shall be just, consistently with this judgment. And it is further ordered, That the appellant do pay, or cause to be paid, to the said respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the said Court of Session, or the Lord Ordinary officiating on the Bills during the vacation, is hereby empowered to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

G. and T. W. WEBSTER—RICHARDSON and CONNELL, Agents.

[HEARD 13*th March*—JUDGMENT 14*th August*, 1846.]

The RIGHT HONOURABLE FOX MAULE and others, Commissioners for improving the Harbour of Perth and the Navigation of the River Tay, *Appellants*.

SIR THOMAS MONCRIEFFE, BART., *Respondent*.

*Property.—Parliamentary Powers.—Public Works.*—Where parliamentary powers have been given for the construction of works, in a particular locality, with a power of deviation, and to purchase the lands requisite, if the power has been once exercised, but not to the extent of the limits allowed, it is exhausted, and it is not competent again to resort to the power for the purpose of enlarging the works to the extent of the limit allowed, and for that purpose to require an additional sale of land from the adjacent proprietors.

*Public Works.—Parliamentary Powers.*—When an Act authorizes the construction of a work, according to specified plans, and in a specified position, and gives a power of deviating to a fixed distance from that position, if a position has once been adopted, the power to deviate cannot afterwards be resorted to, so as, in fact, to create an extension of the works.

*Ibid.—Ibid.*—Where plans of projected works are referred to and adopted by the statute authorizing their construction, these plans are to be looked at in order to construe the general powers given by the statute, in regard to the nature, extent, and position of the works.

*Expenses.*—Where the appeal was against an interlocutor of a majority of the Court below, obtained by one of the Judges withdrawing his vote, no costs, in exception to the general rules, were given at dismissing the appeal.

BY the 4th and 5th William IV., cap. 67, powers were given to commissioners to be elected under the Act, for the construction of a tidal harbour at the city of Perth, with docks and other works, in the language of the preamble, "in such manner "and of such dimensions as the trade of the port may require."

By the 9th section of the Act, power was given to the

commissioners, "To cause, make, form, and erect a tide-harbour, "a dock or docks, either a dry or a wet dock or docks, as they "may find to be practicable, or judge expedient or advisable, "with a canal or canals, cuts, entrances, or other accesses "thereto, and all embankments, retaining-walls, locks, sluices, "draw-bridges or other bridges, buttresses, barriers, bulwarks, "quays, landing-places, or other works or erections they shall "deem proper or requisite, with roads, railways, towing-paths, "or other accesses or communications connected with, or in "their opinion, necessary for the same."

By the 10th section, the commissioners were empowered "To take and use such part of the property of the community "of Perth, and of the inch or island commonly called the Sand "Island, belonging partly to the said community of Perth, and "partly to Sir Thomas Moncreiffe, baronet, as may be found "necessary for the purposes aforesaid, or to make such bul- "warks, jetties, abutments, embankments, retaining-walls, "towing-paths, roads, railways, carriage-ways, locks, sluices, "bridges, or other works or erections in or upon the said inch "or island, or along the same, or in the bed or channel of the "river Tay, opposite to, running along, or contiguous to any "part of the said property or island, as they shall judge neces- "sary; also to take or use such parts of the lands, grounds, or "estate of the said Sir Thomas Moncreiffe, baronet, lying upon "the west side of the river Tay, and, with the previous consent "in writing of the right honourable and honourable the prin- "cipal officers of his Majesty's Ordnance, but not otherwise, "to take and use any part of the grounds upon which the Ord- "nance depôt at Perth is situated, and in the bed or channel of "the river Tay, opposite to or running along the east side of "the same, as may by the said commissioners be deemed "necessary for the purposes aforesaid."

The 17th section of the statute was in these terms:—"And "whereas a survey has been taken, and maps, or plans and

" sections have been laid down and constructed, showing the " position, nature and extent of the proposed tide-harbour, dock " or docks, canal or access thereto, lock thereon, and relative " embankments, quays, piers, roads, accesses, and other works " connected therewith, of the course of the navigation of the " river within the bounds of the said port and harbour of Perth, " fords therein, and position of the embankments necessary " for joining to the mainland the several islands before men- " tioned, and such maps, plans, and sections, together with " books of reference, containing lists of the names of the " owners and occupiers of the lands, tenements, fishings, and " other heritages thereby affected, have been deposited in the " office of the clerk of the peace for the county of Perth, and " also in the office of the clerk of the peace for the county of " Fife: Be it therefore enacted, That such maps, or plans and " sections, and books of reference shall remain in the custody " of the respective clerks of the peace of the said counties, and " all persons shall, at all reasonable times, have liberty to " inspect and peruse the same, or obtain copies thereof, or " extracts therefrom, as occasion shall require, paying to the " said respective clerks of the peace the sum of one shilling for " every such examination, or sixpence for every seventy-two " words of such copies or extracts; and the said commissioners, " in making the said intended improvements, shall not deviate " more than one hundred yards from the position of the said " dock or docks, and tide-harbour, or the course, line or direc- " tion of the said canal, roads, railways, or other accesses thereto, " or embankments connected therewith, as laid down and deli- " neated on the said maps, or plans and sections, without the " express consent and concurrence in writing of the owners and " occupiers of the lands, tenements, fishings, or other heritages " that may be affected by such deviation."

And the 19th section was in these terms:—" And whereas, " by the said recited Act, it is provided and enacted, that the " works thereby authorized should be executed and completed

" within the space of five years from the passing of the said " Act; and whereas the additional works now proposed will " require a prolongation of the time for the proper execution " thereof, more especially as the same will fall to be executed " progressively, as the trade of the port and harbour of Perth " will require the same, and as the produce of the rates and " duties hereby imposed will prove sufficient to meet the expense " thereof: be it therefore further enacted, that the time and " period for the execution of the works and operations by the " said recited Act and this Act authorized to be made, done and " performed, shall be, and the same is hereby extended to the " period of five years from and after the passing of this Act, for " deepening and improving the navigation of the river beyond " the bounds to which the said recited Act applies; and twenty " years from and after the passing of this Act, for the execution " of the other works and operations, such other works and ope- " rations being always to be executed upon lands, grounds or " heritages, which shall be at the time the property of the com- " munity of the city of Perth, or of the said commissioners."

In the month of February, 1835, the commissioners, by proceedings before the sheriff, under the authority of the statute, obtained possession of the lands " which it will be necessary " to take and use," which were, in fact, the whole of the lands delineated on the plan referred to in the 17th section of the statute, and forthwith commenced the formation of the works authorized by the Act. Part of the land so purchased was a portion of an island called Sand Island, the property of the respondent.

In the month of April, 1836, the commissioners presented a fresh application to the sheriff, in order to compel a sale by the respondent of another portion of Sand Island, not embraced in the plans referred to in the 17th section of the statute, and for the purpose, as alleged, of increasing the extent of the works delineated on the plans. The land so sought to be obtained was, however, within 100 yards from the line laid down in the plan.

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The respondent resisted this application; but the sheriff sustained it, and remitted the question of value to the knowledge of an assize. The respondent thereupon brought an action against the appellants, to have it declared "to be the "true meaning and construction of the foresaid statutes, that "the foresaid commissioners were only entitled to acquire such "parts and portions of the pursuer's lands as were delineated "upon the said plans, or maps and sections specified in the "said Acts: That the lands and grounds acquired and taken "possession of by the predecessors of the said defenders from "the said pursuer, under their application to the sheriff, of the "date 13th February, 1835, as aforesaid, were the whole lands "and grounds authorized by the said Act of 4 and 5 Will. IV. "cap. 67, to be taken from the pursuer, for the purposes therein "specified; and consequently, that the authority contained in "said Act to take lands and grounds from the pursuer is now "exhausted."

The Lord Ordinary, on the 10th December, 1842, decerned in terms of the libel, and subjoined to his interlocutor the following note:—

"*Note.*—The Lord Ordinary has, at different times, entertained different opinions upon this cause, and even yet he "does not pronounce the above judgment without hesitation. "Having regard, however, to the principle of strict construction, upon which statutes, such as that in question, fall to be "interpreted, and holding, if a doubt at all remains, that the "balance must be cast in favour of the protection of property, "and against the compulsory powers which encroach upon "private right, he has come to be satisfied, after the most "anxious and deliberate consideration he can bestow upon the "matter, that the safest line of judgment is that which he has "adopted.

"The grounds upon which he has arrived at this conclusion, "are shortly these:—

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"1. It is not to be presumed in any case, (but quite the "contrary,) that the legislature, in conferring compulsory "powers, meant to leave the parties obtaining such powers "without any limitation in their use. On the contrary, it is "for the very purpose of declaring and enforcing such limita- "tions, that clauses referring to plans and books of reference, "from which the extent and nature of the statutory works may "satisfactorily be gathered, and confining the power of alteration "or deviation within certain bounds specifically set forth, have "come to be introduced.

"2. Such a limiting clause is accordingly to be found in the "present case, in the 17th section of the statute libelled; and "there appears no sound reason for holding that it was inserted "for any other than the usual purpose.

"3. Indeed, if it had not been for some supposed conflict "between the enactments of this clause, and those contained in "a separate section (the 10th), it would have been impossible "to put any other construction upon it, or to deny to it its "usual effect any more in the case of the pursuers than in the "case of the numerous other parties having properties along the "whole line of the statutory works.

"In this state of matters, it cannot be held that the legis- "lature intended of purpose to insert contradictory and incom- "patible enactments; and as it is further impossible, by any con- "struction of the 17th section, to extend the limits thereby "assigned, so as to include *the whole* of that portion of the "pursuer's property, which the defenders *now* seek to take "under the 10th section, the consideration is necessarily forced "upon the Court, how far the words of the 10th section may "not, on the other hand, admit of a construction consistent "with the full and proper operation of the 17th section. Now,

"5. The question being brought to this issue, the Lord "Ordinary has come to be satisfied, that as, in order to carry "out the statutory works, even as they are limited in the 17th

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" section, (more especially if regard be had to the line of " *maximum* deviation,) it was necessary that the defenders " should be authorized compulsorily to take *certain portions* of " the pursuer's property, falling within the general description " given in the 10th section. This, while it is quite enough to " satisfy substantially the statutory words, furnishes really the " true key to a reconcilement of the two clauses. The 10th " section, so far as affects the pursuer's said property falling " thus to be construed, just as if it had, in so many words, " authorized and empowered the defenders to take and use " *such parts* of the pursuer's portion of the Sand Island, as the " defenders shall judge necessary for executing the statutory " works, whether 'in or upon the said inch or island, or in or " 'along the same, or in the bed or channel of the river Tay, " 'opposite to, running along, or contiguous to any part of the " 'Sand Island,' the property so to be taken, and the works to " be constructed thereon, *always not going beyond the general* " *statutory line of operation, as defined and limited in section* 17, " *taking into account the extent of deviation thereby permitted.*"

The Court were equally divided in opinion as to the soundness of the Lord Ordinary's interlocutor; but upon the Lord Justice Clerk withdrawing his vote, they adhered to it.

The appeal was against these interlocutors.

*Mr. Turner* and *Mr. Anderson* for the Appellants.—It is not disputed that the appellants are acting *bona fide*, in requiring possession of the additional land desired. The only question is, in regard to their power to take it under the authority of the statute. The object of the statute, as set forth in the schedule, is not the construction of a harbour and dock of any particular dimensions, but a harbour and dock " of such dimensions as " the trade of the port may require." Necessarily contemplating, unless it could be presumed that the extent of the trade would be stationary, an increase of the dimensions from

time to time, as the increase of the trade might dictate. Accordingly, the works to be executed, are by the 9th section limited in extent only, by the opinion of the commissioners; they are to be such "as they may find to be practicable, or judge expe- "dient or advisable." And the power given them by the 10th section, in regard to the taking of lands, is to take such "as "may, by the commissioners, be deemed necessary for the pur- "poses aforesaid," that is, for the purpose of making such works as the appellants "may find practicable, or judge expe- "dient," in making a dock of "such dimensions as the trade of "the port may require." No powers could well be more ample or indefinite; and the object in view necessarily required that they should be so, as it was not possible to anticipate what the wants of the trade might grow to.

The object of the 17th section was not to limit the powers thus conferred; to produce the conflicting result of making that limited, which the previous sections had made unlimited, unless by the varying demands of trade. All the object of the 17th section was to fix the particular locality or "position" of the works, and having done so, to allow a deviation from that locality, of 100 yards from the given point; the powers in regard to the extent of the works in that altered locality, remaining as large as the previous sections had declared them to be. The appellants have adhered to the locality fixed by the plans referred to in the 17th section, they have not "deviated "from the position of the said docks" as delineated on the plan, nor do they seek to do so now; they adhere to that position: and all they desire to do is, to enlarge the works according to the increasing demands of the trade of the harbour; and there is nothing in this section which limits them from so doing.

*Mr. Solicitor-General* and *Mr. Bethel* for the Respondent.—The recital of the 17th section—the statement of the appellants themselves—is, that the "extent," as well as the "position

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and nature" of the proposed works, were shown upon the plans deposited; and the express enactment of the section is, that these plans shall remain in the custody of specified public officers, in whose hands the public are to have access to peruse and inspect them. And the concluding part of the section gives the projectors power to deviate from the position laid down on the plans, to the extent of 100 yards, but declares that they shall not do so, beyond that, without the consent of the owners of the land to be affected by the deviation. While it gives this power in regard to the "position" of the works, the section is silent in regard to the "nature" and "the extent" of the works; in regard to these no power of deviation is given. To what purpose could the power of inspection of the plans be given, but to enable the public to see the nature, position, and extent of the proposed works? And what advantage could the public derive by seeing the extent of the works, if the projectors were to be at liberty at any time within twenty years, (for so long the 19th section gives them,) to alter that extent? Giving, therefore, the 9th and 10th sections as broad a construction as the appellants contend for, these sections cannot be read without reference to the 17th section. In other words, the Act gives the appellants power to make such works as in their opinion the trade of the city of Perth may require, with this qualification, that the nature of the works must be the nature specified in the plans, and that the extent must not exceed, nor the position deviate from, the extent and the position specified in the plans, with an exception in favour of a deviation of the position to the extent of 100 yards.

If the 9th and 10th sections are not to be taken with reference to the 17th section, this monstrous consequence would follow, that the appellants might vary the nature and extent of the works at their arbitrary discretion, and take the lands of all and sundry for the purpose. And as the 19th section gives the appellants twenty years within which to

accomplish the works, the surrounding proprietors must, during that period, remain in uncertainty whether their lands will continue their own or become the property of the appellants; which is, in other words, to say, that for twenty years their lands must continue unsaleable to any one but the appellants, and inapplicable to any purpose but that of agriculture. Not only so, but during that period, the property of the adjacent proprietors would be at the mercy of the appellants, for no proprietor could maintain trespass against them. He could never be certain whether they or their servants were acting within or independently of the powers of the Act. A construction which would give powers so unlimited, and productive of such serious consequences to third parties, is one which no Court will adopt unless compelled by the express terms of the statute to be construed. Taking the 9th and 10th sections, however, in connection with the 17th, there is nothing in their express terms which gives the power contended for, while the obvious inference from the 17th section is, that the works authorized by the 9th and 10th sections are to be limited as to their position, nature, and extent, by the plans deposited, except that there may be a deviation in their position to the extent of 100 yards. This construction is confirmed by the 19th section. That section, while it gives the appellants twenty years to execute the works, declares that the works shall only be executed upon lands the property of the community of Perth, or of the appellants, plainly contemplating that the appellants should purchase the quantity of land required to the extent allowed by the 17th section; and having done so, they might have the advantage of twenty years' experience to ascertain what the nature and extent of the works should be.

Admitting this construction of the statute, however, to be doubtful, the House will give the benefit of the doubt in favour of the respondent, and against the appellants. In Blakemore *v.* Glamorganshire Canal Company, it was held that Acts

of Parliament, such as the one now in question, were of the nature of contracts between the promoters and the public; and as they are framed by the promoters themselves, the construction of them, so far as their terms make it doubtful or ambiguous, must be in favour of the public, and against the promoters.

Further, the appellants did, in fact, purchase lands to the extent and in the position specified upon the plans. Whatever, therefore, may be the proper construction to be put upon the statute, the powers given by it were exhausted; and it is not competent for the appellants to recur to the power a second time, or it may be for a third or a fourth time. In this, these parliamentary powers are not different from other powers. The appellants are authorized to take the lands they may require; but, having once exercised this authority, there is nothing in the statute which gives them power to repeat the operation from time to time. The legislature authorizes interference with the ordinary rights of property for a public purpose. That done, the adjacent proprietors are entitled to the enjoyment of their property without the fear of further disturbance.

*Mr. Turner* in reply.—So far from the 17th section authorizing the limitation upon the powers given by the 9th and 10th sections contended for by the respondent, its effect is the reverse. That section declares, that the position marked on the plans shall not be deviated from more than 100 yards, which in other words, is to say, that, with that exception, the position of the works shall be that described upon the plans. But there is nothing in that section which requires that the nature and extent of the works shall be the nature and extent delineated upon the plans. The nature and extent, therefore, are left to be determined by the 9th section, where they are specified to be such as the appellants shall deem to be proper or requisite.

And the power given by the 10th section is to take not such lands as *have been* found necessary, but such as *may be* found necessary, showing that the extent had not as yet been ascertained. The 17th section, in short, is entirely a deviation clause and no other.

LORD BROUGHAM.—My Lords, in this case the question arises between the trustees of the works in the port and harbour of Perth, and a worthy baronet, Sir Thomas Moncreiffe, heritable proprietor of an island called Sand Island, upon the river Tay; and the question is entirely as to the construction of the act under which the trustees hold, those trustees being formerly Mr. Kinnaird, and afterwards Mr. Fox Maule, who, as member of the borough, with others, is an official trustee, and in whose name the proceeding was instituted. The action was a declarator that there was no right in these parties to take the premises in question of Sand Island from Sir Thomas Moncreiffe, under the circumstances of the case; this led to a discussion of the provisions of the act which we have had occasion fully to look into.

The sections in question are the 17th section and the 10th section. If the 10th section had stood alone, one conclusion might certainly have been drawn from it, and one result might have been obtained in the argument; but that section is to be taken in connection with the important section, that is, the 17th, for the protection of the landowner, fixing the limits of the powers of the commissioners; and no doubt it is not necessary, as, indeed, three out of five of the learned Judges seem to have thought in considering the case, in which I agree with them, that we should take the 17th section as repealing or controlling the 10th section; but taking the two together, as we are bound to do, *in pari materiâ*, in the very same matter in fact, the conflicting rights and claims of the trustees acting under the act, and of the proprietor, taking them together, we must construe the

clauses together, and I agree with Lord Moncrieff in holding that there is not any insuperable difficulty in combining the two together, and in construing the two together and in favour, therefore, of Sir Thomas Moncrieffe, and against the trustees.

My Lords, it is an observation made in the course of the argument here, certainly in the papers below, that when parties come before you relying upon a private or local act, that act being of their own preparing, every difficulty that arises upon its construction must be taken stringently as against them, rather than against the parties in conflict with them; if they leave anything out which is necessary to sustain their own rights, it is their fault that they made the omission, and they shall not be allowed by intendment, to supply the defect which they have left; if they leave anything ambiguous, anything raising doubts, then the benefit of the doubt shall be given, not to them, but to the party in conflict with them; it is for them to make the matter clear in framing that which is their own title deed, their own act; and just as you assume in every case, except in the case of the crown, most strongly against the granter of the deed, so you ought to assume in every case rather against the framers of an Act, who benefit under the Act, who act under the Act, and who are entitled under the Act, and who have framed their own title deed; you are to assume rather against them and to hold the construction rigorously against them, rather than against the other parties.

My Lords, the only doubt I had upon this case was, as respects the question of costs of the appeal; the appellant in this case stands in peculiar circumstances. In general our rule is, and I dwell upon this, that no doubt may be entertained of the general subsistence of our rule, where we affirm the judgment appealed from, to give costs as against the appellant or the plaintiff in error in the case of a writ of error. But in this case I should suggest humbly to your lordships to make an exception, and not to give costs as against the appellant, and

my reason is this. When an appellant comes to dispute a judgment, I assume, when I give the costs of the appeal against him and to the respondent or the defendant in error, as against the plaintiff in error, that he, the respondent or the defendant in error, is in possession of the judgment, and that the other party comes here to dispute the judgment actually delivered against him, and for his adversary. It is very fit that in that case the costs of the appeal or of the writ of error should be given against the party bringing it here, because he vexes the other party who is in possession of the judgment. But the very foundation of that rule is, that the other party is possessed of the judgment. Now, observe that that is only nominally the case here, for when Lord Ivory had given his interlocutor, which he came to with very considerable hesitation, he seemed to doubt, and he expressed himself as feeling a difficulty in the case, (it is not upon that ground that I am going to propose not to give these costs, but upon another ground). The parties against whom he gave judgment, the trustees, Mr. Fox Maule or Mr. Kinnaird and the others, carried it to the Inner House. Sir Thomas Moncrieffe then was possessed of the judgment of Lord Ivory, the Lord Ordinary; on a reclaiming note the judgment goes to the Inner House; there the Judges are equally divided. My Lord Justice Clerk is clearly of opinion, and very strongly of opinion, against the Lord Ordinary; Lord Medwyn concurs with the Lord Justice Clerk; Lord Meadowbank takes the other line and is with the Lord Ordinary, and is very clearly of opinion with the Lord Ordinary; Lord Moncrieff is of opinion, though perhaps not quite so unhesitatingly, as Lord Meadowbank; he says it is attended with difficulty, but he expresses a much clearer opinion than Lord Ivory had done. Lord Ivory appears to have doubted considerably more than Lord Moncrieff, but Lord Moncrieff says that the case is attended with considerable difficulty, but still he gives an opinion, and a very strong and decided opinion, against the

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Lord Justice Clerk and Lord Medwyn, and with Lord Meadowbank.

Then the Court was equally divided, and they had two courses to take—either to retain that equal division and to send for the consulted Judges, which they did not do, or to adopt the course which they did adopt, and which brings the case here; the Lord Justice Clerk saying, I withdraw my vote as a judge, and leave you to be two to one in favour of the interlocutor of the Lord Ordinary, in order that it may go to the House of Lords.

Now, my Lords, this is stronger than a recommendation of a judge to appeal, which is always looked to as material in weighing the question of costs—it is stronger—it almost makes it inevitable. It says, there is no judgment properly against you, the appellant; but there is an equal division of opinion which would have led to an adherence to the Lord Ordinary's interlocutor. What we have to consider is that this case is sent here by the Lord Justice Clerk withdrawing his vote; without that it might not have come here; and I must say, with great deference to that learned Judge, that I do not think that he took quite the right course. I think that the expense is so much greater, and the delay is so much greater, of coming here, that it would have been a great deal better if he had adhered to his opinion, and then they must have called in the consulted Judges. I think it is to be regretted that he took this course, for if they had called in the consulted Judges, the probability is not very great, that there would have been in that case an equal division—that six would have been one way and six the other is highly improbable; and I think that it would have been better upon the whole, than sending the case here; for it is rather disagreeable that a case should come up here without necessity. In all probability, or at least we have a right to suppose that there would have been an acquiescence in a real judgment, which this can hardly be said to be, at all events if

there had been a real judgment, and it had come up here, the party who came to this Court would have risked the costs, and would certainly have had to pay the costs, if the judgment had been affirmed.

My Lords, I have thought it right, with a view to other cases, and as bearing upon the appellate jurisdiction of this House, to enter at large into this matter. I have no doubt upon the case, and I have come to the conclusion, that we ought to affirm the interlocutor of the Court below, but without costs.

LORD CHANCELLOR.—My Lords, it is impossible not to feel that there is very great difficulty in the provisions of this Act; but, at the same time, when they are properly considered, I do not think that the construction to be arrived at is a matter of so much doubt, because one construction would lead to a result which I believe was never found in any enactment connected with a subject of this description, namely, the power to take property for a public purpose, so large without any limit, except the limit of the island itself, as to the purposes to which it is to be applied.

Now, these works obviously were not intended to embrace, as originally projected, the whole of this island; and yet if the 10th section were to be the rule of the powers of the commissioners, there would be no restriction whatever. The 9th section would authorize them to make a dock and tide-harbour, and the 10th would enable them to take whatever land was necessary for that purpose. Now, when the property of individuals is taken for a public purpose, the Act of Parliament which passes for that purpose, carefully specifies what the property is which is to be liable to the powers of the Act; and on the part of the appellant the contest is, that the provisions of this Act impose no restriction whatever upon the commissioners, but that they might take whatever property they might from time to time

think necessary, for the purpose of making the harbour and dock to the extent of the limits of that island, the dock being not limited or described by the deed of settlement, that is to say, they construe this clause without reference to the 17th. We have, then, in the 9th and 10th clauses a parliamentary enactment, that the commissioners may be at liberty to make these works, and that they may take what land they think proper for this purpose. But then, in the 17th clause we find what these works are, and to what extent they are to be carried; and if the proper construction of the 17th clause be to construe it as limiting the 9th and 10th clauses, the supposed peculiarity of this Act entirely disappears; and we have, though in a different shape from that which is the usual course adopted,—namely, first describing the work which is to be effected, and then describing the property which is to be taken for the purpose of effecting the prescribed work,—we have the 17th clause referring to certain plans deposited as required by Parliament.

And here, my Lords, I must observe, that the course which I think the Court below have very properly taken, in referring to these plans, is not at all inconsistent with the course which this House lately took in a railway case, (North British Railway, *v.* Tod, supra p. 199,) where we thought that plans not referred to in the Act, could not be looked to for the purpose of putting a construction upon the Act, because this 17th clause refers to particular plans deposited in a particular place, and refers to them for the purpose of construing the enactment comprised in the 17th clause. Having referred to them by a word which seems to have very much puzzled the appellant, namely, the word "extent," it was laboriously endeavoured to be proved throughout the papers, that that was erroneously introduced into the Act, and that all that was intended was, to describe the position and the line of the intended work, and not its extent; but the enactment, unfortunately for the argu-

ment, is this: "And whereas a survey has been taken, and maps "or plans, and sections have been laid down and constructed, "showing the position, nature, and extent of the proposed tide "harbour." And then comes the enactment upon which the question turns: "And the Commissioners in making the said "intended improvements, shall not deviate more than 100 "yards from the position of the said dock or docks, and tide "harbour." Here then we are told that on referring to certain plans, we may see the line and position and extent of the intended works, and that the parties shall not deviate more than 100 yards from the works so described.

Now, that power of deviation which was relied upon on the part of the appellant, it is quite clear has no reference to the matter now under your lordships' judgment, because the commissioners made the works; and the moment they made the works in the prescribed line and position to be found in these maps, there was no longer any question as to the deviation. They might have made those works, not exactly in the line prescribed in these maps and plans; that is to say, they had the power of going 100 yards more on one side or other of the line, but the result of the argument of the appellant would have been this, that the 100 yards meant as the deviation was to be taken as 100 yards extension on one side or the other; that is not the meaning of the clause, or the power given to deviate within the prescribed limit of 100 yards. Their work would not still be of the same extent. All that is meant is, that the work must not necessarily be precisely in the same position, but it may be in some other position within 100 yards of the position as described upon the maps or plans.

If this 17th clause is to be considered as a description of the works referred to in the 9th and 10th clauses, the whole enactment is consistent. The 17th clause referring to the plans, tells us what the works are, and then the power contained in the 10th clause is to take the lands necessary for the purpose

aforesaid: to be sure, these are not purposes, strictly speaking, aforesaid, because they are to be found in the 17th section; but they are works described in the same Act, and the powers to be taken must be taken with reference to the works described, though in a subsequent section. Then taking these two sections together, we know what the works are. The question of deviation does not at all apply in the present case; the works so described were completed shortly after the Act passed, and now the appellants say, that, under the 10th section, disregarding the 17th, they have a right to go to any part of this island, and take it for the further extension of the works. My opinion is, that the 17th section regulates the 9th and 10th sections, and that they are not at liberty, therefore, to go beyond the works which are described in the maps and plans referred to in the 17th section.

LORD CAMPBELL.—My Lords, I am entirely of the same opinion; and I must go a little further, and say, that if the commissioners had the power, originally, of doing what they now claim to do, my opinion is, that, in the just construction of the Act of Parliament, the option having been made to take less than the parties might have taken at first, they cannot come successively and go to the full limits to which they might have gone originally. It seems to me, that such an Act of Parliament gives the commissioners the power, only, of once taking a portion of the land of another, having it valued, and taking possession of it; and that that option having been once exercised, the commissioners cannot afterwards vex the proprietor of the land, and at successive times go to the full extent which the Act might have authorized, if in the first instance the full power had been exercised.

LORD BROUGHAM.—My Lords, I ought to state that I entirely agree with the last observation of my noble and learned friend who has just spoken; and at the hearing of this cause, I

threw out that more than once to the counsel in the course of the argument.

*Interlocutor affirmed without costs.*

It is ordered and adjudged, That the said petition and appeal be, and it is hereby, dismissed this House, and that the said interlocutors therein complained of be, and the same is hereby, affirmed.

SPOTTISWOODE and ROBERTSON—DEANS, DUNLOP, and HOPE, Agents.

[HEARD 12*th March*—JUDGMENT 14*th August*, 1846.]

The MOST NOBLE JOHN, MARQUIS OF BREADALBANE, &c., *Appellant.*

TEMPLE FREDERICK SINCLAIR, ESQ. of Lybster, and his TRUSTEES, *Respondents.*

*Warrandice.—Obligation.—Real and Personal.*—An obligation of warrandice in a charter against augmentations of stipend although not a personal obligation which will transmit to the executors of the grantee in the charter, will not vest in a successor of the grantee because of his proprietorship of the lands, without any evidence of its transmission to him along with the lands.

IN the year 1655 the Earl of Caithness granted Sinclair a wadset for 4,400 merks over the lands of Lybster. On the 17th September, 1691, the Earl of Breadalbane, who, in right of his wife, had acquired right to the lands and to redeem this wadset, entered, with consent of his wife and of Lord Glenorchy, his eldest son, into a contract of sale with Sinclair, whereby in consideration of a further payment of money to the Earl of Breadalbane and Lord Glenorchy, as the price, taken together with the 4,400 merks, of the reversion of the wadset, the earl and Lord Glenorchy sold and disponed the lands of Lybster and the parsonage teinds thereof, to "James Sinclair and his heirs "male, whilk failing to his heirs whatsoever and their assignees, "heritably and irredeemably."

The contract contained an obligation upon the earl and his son, to infeft Sinclair in the lands, and for that purpose to grant him a charter to be holden of them as superiors for their respective interests of liferent and fee for payment of four pounds Scots of feu duty, the charter to contain a clause of warrandice,

the nature of which was declared by the following clause:—
"Which charter and infeftment shall bear and contain this
"absolute and ample clause of warrandice, following lyke as
"now as if the said charter and infeftment were already past
"and expede, and then as now, the said noble Earl, John Earl
"of Breadalbane, and John Lord Glenorchy his son, be thir
"presents, binds and obliges them, conjunctly and seally, their heirs
"and successors, with consent above specified, to warrant,
"acquyte, and defend the present right and disposition, charter,
"and infeftment to follow hereupon, lands, teynds, and others
"above disponed, to be sufficient, free, safe, and sure, to the
"said James Sinclair and his foresaids, from all and sundry
"wairds, relieffs, non-entries, marriages, escheats, liferents, for-
"faulters, conjunct fees, ladies' terces, wadsets (except the right
"of wadset above narrated, granted by the said deceased George
"Earl of Caithness, to the said deceased John Sinclair,) annual-
"rents, former alienations, private and public, infeftments,
"interdictions, inhibitions, apprysements, adjudications, resigna-
"tions, disclamations, perprestures, reductions of infeftments,
"services, and retours, improbations, tacks, assedations, long or
"short, nullities, bygone stents, taxations, impositions, teynd
"duties, minister's stipends, and augmentations thereof, and
"generally from all ōyr perils, burdens, dangers, incumbrances,
"and grounds of eviction whatever, as weill not named as
"named, (excepting as is above and after excepted,) qlk may
"anieways stop, trouble, or impede them in the peaceable
"possession, bruiking and enjoying of the lands, teynds, and
"others above disponed, and intromission with the mails and
"dewties qrof in tyme coming, att all hands, and against all
"deadly, as law will; excepting allways furth and frae the said
"warrandice all cess, supplies, taxations, law of excise, and
"other public burdens and impositions qtever, imposed, or to
"be imposed upon, and ych is or shall be payable furth of the
"said lands and others foresaid, with the pertinents, which the

" said James Sinclair and his foresaids are to pay and bear the " burden of themselves furth and frae the term of Whitsunday " last, and in all tyme coming; declaring always the teynd- " duties, ministers' stipends, and augmentations yrof, are noways " understood to be comprehended in the said exception, but " the said Earle and Lord, and their foresaids, are to relieve " the said James Sinclair and his foresaids of the samine, " alsweil in all tyme coming as for byegones, in manner above " exprest."

On the same day, the 17th of September, 1691, a charter was granted by the Earl of Breadalbane and Lord Glenorchy " pro perimpletione et observatione," of the contract of sale, by which they conveyed the lands and teinds to Sinclair and the series of heirs in the contract " Cum et sub provisionibus " subtus script." This charter contained the following clause— " Et similiter *per præsentes* specialiter providetur et declaratur " quod quocunq. jure seu titulo predictus Jacobus Sinclair " suique predict fruentur et possidebunt predictas terras decimas " aliaq. supra disposit.; attamen semper tenebuntur et obliga- " buntur, sicuti per acceptationem presentis nostræ cartæ se " suosq. obligant. *terras aliaq. supra recitat.* nunc et omni " tempore futuro tenere frui et possidere modo et cum et sub " provisionibus et conditionibus inter nos *nunc* conventis " solummodo, secundum tenorem prædicti contractus alienationis " et *præsentis nostræ cartæ* desuper sequen. in omnibus punctis " et non aliter." The clause of warrandice was thus expressed:—" Et nos vero dicti Joannes Comes de Breadalbane " et Joannes Dominus de Glenorchie unanimo consensu nos " nostrosq hæredes et successores predict. *terras decimas aliaq.* " *supra mentionat.* cum pertinen. prefato Jacobo Sinclair ejusq. " antedict. in omnibus et per omnia forma pariter et effectu, ut " premissum est, secundum tenorem dictæ dispositionis seu " alienationis contractus cum reservatione et exceptione predict. " contractus impignorationis supra mentionat. et cum et sub

" cæteris provisionibus et conditionibus inibi content. contra " omnes mortales, warrandizare et in perpetuam defendere " obligamus et astringimus." And the precept of seisin directed infeftment to be given, " secundum formam et tenorem " presentis nostræ cartæ et cum et sub conditionibus excep- " tionibus provisionibus et qualificationibus inibi content."

In the year 1719 Lord Glenorchy, as fiar of the superiority of Lybster, conveyed it to Sinclair of Ulbster, " with and under " the burden of all bargains and sales made by our said umqhl " father, (the Earl of Breadalbane), or us, of any part or portion " of the lands, teinds, and others particularly and generally " above disponed, or tacks of any of the said teinds or oblige- " ments therein contained, before the said 7th day of January, " 1719 years; which the said John Sinclair, by his acceptation " hereof, binds and obliges him, his heirs, and successors what- " somever, to ratify, approve, and implement, in the haill " heads, tenors, and contents thereof, in so far as we or our said " umquhl father are bound thereby, or never to quarrel or " impugn the same upon any account whatsomever, that will " afford ground of eviction or recourse against us or our " foresaids." The superiority was afterwards conveyed by the Sinclairs of Ulbster to Gunn.

In 1768, Alexander Sinclair, the grandson of James Sinclair, the party to the contract of sale and grantee in the charter, made up his title as heir to his grandfather in the *dominum utile* of the lands and teinds, by precept of *clare constat* from Gun as superior. This precept contained the clause which has been quoted from the charter.

In 1774, Alexander Sinclair granted a disposition " for love, " favour and affection," to Patrick Sinclair, his eldest son, of the lands and teinds, " as the same were some time possessed " and occupied by the deceased John Sinclair of Lybster, and " his tenants, together with all right, title, or interest which I, " my authors or predecessors had, have, or anyways may have

" claim or pretend thereto, or to any part or portion thereof in " time coming: But reserving always to me, the said Alexander " Sinclair, my liferent right of the lands and others above dis- " poned, during all the days of my lifetime, &c. And more- " over, for the causes foresaid, I hereby make and constitute " the said Captain Patrick Sinclair and his above written, my " cessioners and assignees, not only in and to the rents, maills, " and duties, of the lands and others above disponed, from and " after the first term following my decease, and thereafter in " time coming; but also in and to the whole writs and evidents, " rights, titles, and securities, both old and new, made, granted, " and conceived in favours of me, my authors and predecessors, " of and concerning the lands and others above disponed, " together with all that has followed or is competent to follow " upon the same."

In 1821, the respondent obtained from Sir Ralph Anstruther, (who had now become the superior by purchase, under a judicial sale of the estate of Gunn,) a charter of confirmation and precept of *clare constat* as heir of Patrick Sinclair, his father. This charter repeated the clause contained in the original charter and in the precept of *clare constat*, to Alexander Sinclair.

In the year 1836, the respondent as " heritable proprietor " of the lands of Lybster and others, with the teinds and per- " tinents thereof," brought an action against the appellant, who was the successor of the vendor—against Sir George Sinclair, of Ulbster, the successor of the purchaser of the superiority in 1719—and also against Sir Robert Anstruther, the successor of Sir Ralph Austruther, the summons in which set forth that, since the date of the charter (1691) following upon the contract of sale, " the said lands and estate of Lybster, with the teinds " and pertinents, have been feudally vested in the pursuer and " his ancestors, under successive renewals of the said inves- " titure;" and that since the date of the contract of sale,

several augmentations of stipend had been localled upon the lands of Lybster by interim scheme, without any final scheme having ever been made up; and, in consequence, he and his authors had been under the necessity of paying this augmentation to the minister. "And although the pursuer has often "desired and required the Most Noble John Marquess of "Breadalbane, who now represents the said deceased John Earl "of Breadalbane and Holland, and the said deceased John "Lord Glenorchy, his son, and Sir George Sinclair, of Ulbster, "Bart., who now represents the said John Sinclair, of Ulbster, "and Sir Ralph Abercromby Anstruther, Bart., of Balcaskie, "the present superior of the said lands of Lybster and others, "which right of superiority he enjoys in virtue of his repre-"senting the said Sir Robert Anstruther, who acquired the same, "as aforesaid, to reimburse and repay to the pursuer the whole "sums which he and his authors have already advanced to the "minister serving the cure of the parish of Latheron on account "of said lands of Lybster and others from and since the date of "the said contract of vendition and sale, and to free and relieve "the pursuer and the said lands of Lybster and others, in time "coming, of all teind-duties, minister's stipend, and augmenta-"tions thereof, conform to the obligation of warrandice and "relief contained in the said contract of vendition and sale; "nevertheless, the said defenders refuse or delay so to do." Upon this subsumption the summons concluded, that it should be declared, that the defenders, jointly and severally, or at least one or more of them, reserving to them their respective rights of relief, were bound in terms of the obligation contained in the contract of sale of 1692, and of the dispositions, charters, rights, and infeftments, to relieve the respondent and his lands, of all teind-duties, stipends, and augmentations thereof, in all time coming, and should be decerned to repay to him what he had already paid on these accounts.

Sir Robert Anstruther pleaded that he had purchased the

superiority at a judicial sale of the estates of Gunn, who had acquired it from the Sinclairs of Ulbster; that this sale was under a decree, declaring the superiority to be free from the debts and deeds of Gunn, "or of those from whom he derived "right;" and that he, Sir Robert Anstruther, his heirs, and assignees, were "to be freed and relieved of all minister's "stipend, schoolmaster's salary, and other public burdens "due for crop and year 1792, and all preceding."

At an early stage of the proceeding the action was dismissed against Sir Robert Anstruther, upon his motion to that effect, without any opposition to this having been offered by the respondent.

Sir George Sinclair pleaded that the respondent had not established a title to make any claim under the conveyance of 1719; and if he had such title, the claim would, according to his own statement, lie against Sir Robert Anstruther, the present superior.

The appellant pleaded the following defences:—

"I. The pursuer has not produced a sufficient title to enable "him to found a claim of relief on the clauses of the contract "libelled.

"II. The defender does not represent any of the parties to "that contract, so as to be liable for their personal obligations.

"III. The pursuer and his authors having acquiesced in "various augmentations of the stipend of the minister of "Latheron, and having allowed the lands of Lybster to be "localled upon to a considerable extent, without either main- "taining the objections competent to them, or intimating the "existence of these processes, or their claim of relief to the "defenders or their authors, have lost any title which they may "otherwise have had to insist on the conclusions of the present "action.

"IV. Supposing the pursuer's title to be otherwise unexcep-

"tionable, the obligation on which he founds has been long "since extinguished by the negative prescription.

"V. At all events, the obligation has been validly transferred "from the original obligants, and imposed upon the defender, "Sir George Sinclair, by the deed of 1719 libelled."

The Lord Ordinary, (*Wood*,) after ordering cases for the parties, made avizandum to the Court, and issued, with his interlocutor, the following note:—"The Lord Ordinary has "reported this case, because the parties are at variance in "regard to what is to be held to have been settled in point "of law by the case of Maitland against Horne, as decided in "the House of Lords, (21st February, 1842, Bell's *Appeal* "*Cases*, vol. i. p. 1,) and its bearing upon the question of the "sufficiency of the pursuer's title, as endeavoured to be sup- "ported by him, and because, in the view which the Lord "Ordinary takes of that question, it would be the only one "which, were he to dispose of the case by a judgment, could "come before the Court by a reclaiming note against his inter- "locutor, so that if the Court should differ from the opinion "he had formed, the process would in ordinary course be again "remitted to him, and a delay be occasioned in the final adjudi- "cation of the case, which may be avoided by the course he "has adopted, which puts the whole cause before the Court, "whereby whatever points shall be found to require to be "determined may be at once disposed of.

"Upon the meaning and extent of the obligation contained "in the original contract of vendition (1691) of the lands and "teinds of Lybster, there can be no dispute. But it has been "contended by the defender, the Marquess of Breadalbane, "that in so far as the obligation relates to any stipend with "which the teinds in question were then burdened, or to future "augmentations, it was not imported into the charter granted in "implement of the contract, and bearing the same date with it, "the reference in the charter not applying to that portion of

"the obligation which it therefore must now be held had been "ultimately departed from by agreement of parties. It is "thought that the charter will not bear this construction, when "the terms in which the warrandice clause in *it*, and the "reference there made to the contract of vendition, is compared "with the terms of the latter instrument. In it the obligation "or contract to free and relieve the teinds, and the purchaser "and his heirs male, whom failing, his heirs whatsomever, from "the stipend that might be payable out of the teinds, and from "future augmentations, is contained in a separate clause, but "forms part of the clause of warrandice, and is mingled with, "or added to, the proper obligation of warrandice undertaken "by the seller. And although this may not be in any degree "sufficient to alter the nature of that part of the obligation "which relates to existing stipend and future augmentations; "or to render it an obligation of warrandice in the correct legal "sense, still the mode in which it is introduced and expressed "in the contract of vendition cannot be thrown out of view in "construing the meaning of the relative clause in the charter. "On the contrary, it appears to be essential that it should be "carefully attended to, in order to arrive at a just conclusion as "to the meaning of the clause in the charter; and doing so, the "Lord Ordinary apprehends that that clause must be held to "have imported into the charter by reference the contract to "free and relieve the disponee from the burden of both the "existing stipend and future augmentation,—that it is substan-"tially the same thing as if that contract had been recited in "the charter, and that in the question of its transmission the "pursuer is entitled to the benefit of all the pleas which he "could have urged had it been recited *ad longum*.

"With regard, again, to the nature and character of the "obligation or contract, the Lord Ordinary conceives, that, in "conformity to the views upon which the case of Horne was "decided in the House of Lords, it cannot be considered

"as an obligation of warrandice, in the proper sense of that "term, and subject to the rules of transmission applicable to "warrandice. Warrandice has relation to the title of the "subject disponed, and which title is not affected by stipend or "augmentations burdening the teinds. An obligation or con- "tract to free and relieve from these burdens by the vendor "coming in to indemnify the purchaser and his heirs by repay- "ing that which he or they may be compelled to pay out of the "teinds to the minister of the parish, (which is the obligation "now in question,) has, therefore, no connection with warran- "dice in its proper sense. 'It is,' to use the words of Lord "Cottenham, when the judgment in Horne's case was pro- "nounced, 'a contract perfectly collateral to the subject-matter "'of the sale. It is a contract that, in a peculiar event happen- "'ing to diminish the value of the property sold, the vendor "'shall come in and indemnify the pursuer against the diminu- "'tion of the income sustained by the exercise of that legitimate "'authority, by which part of the income arising from the "'teinds may be applied to the support of the minister.'

"The obligation or contract, therefore, is to be viewed and "dealt with, not as one of warrandice, but as a separate per- "sonal contract superadded to it,—a contract, the obligation "undertaken by which may be passed from one hand to another, "but with which the party suing on it must show that he has "regularly connected himself. And the question here, there- "fore, comes to be,—whether the contract has been transmitted "downwards to the pursuer from James Sinclair, in whose "favour it was made by the contract of vendition 1691, and to "whom the charter, of same date, into which it was imported, "was granted.

"Upon the authority of Horne's case, the Lord Ordinary "thinks it clear, that the mere fact of the pursuer being the "proprietor of the lands and teinds of Lybster is not sufficient "to prove that he has a title to maintain the present action,

"founded, as it is, upon the contract above referred to. It "is not a contract or covenant which runs with the lands and "teinds, or which can be so appended to the title as to be the "subject-matter of a suit merely in respect of the possession of "the lands and teinds. The pursuer may, therefore, be pro- "prietor of both without the contract having been duly trans- "mitted to him. It is consequently necessary to consider "whether, by the charter which he holds, or through the "medium of any title made up by him, and those by whom he "is connected with James Sinclair, the contract has passed to "him so as to enable him competently to sue upon it.

"It is stated by the pursuer, that the charter 1691, into "which the contract of relief was imported from the contract "of vendition, is granted to James Sinclair and his heirs-male, "whom failing, his heirs whatsoever; that the pursuer is the "heir-male of James Sinclair, possessing the estate on this title, "and representing James Sinclair in all rights vested in him by "the charter, and transmissible from him by succession; and "that the estate, with all its pertinents and relative rights, has "descended from father to son until it has reached the pursuer, "whose title is built on the foundation of the charter and con- "tract of 1691. And he maintains that, whatever might have "been the decision to be pronounced—following the precedent "in Horne's case—had he been a singular successor, he, as heir, "is in a different position, and that, holding that charter, he "is in full right of the contract in question, *that* contract having "passed or been transferred to him as such. If this plea were "well founded, the contract must, in the first instance, have "passed to Alexander Sinclair, who was the immediate heir of "James; then to Patrick Sinclair, as the heir of Alexander; "and then to the pursuer as his heir and the heir-male of "James Sinclair, and this independently altogether of the titles "by which those parties held the lands and teinds. For the "plea, as the Lord Ordinary understands it, does not rest upon

" the titles which were completed, as being themselves the " means or form by which the contract was transmitted from " heir to heir, till it finally came into the person of the pursuer, " —but goes on this view, that, in virtue of the titles, as made " up by himself and his predecessors, (one of which, it will be " observed, was a disposition by Alexander Sinclair to Patrick " Sinclair, reserving the disponer's liferent, and on which Patrick " was forthwith infeft,) he, the pursuer, is proprietor of the " lands and teinds; and that, although none of these titles may " have carried or conveyed the foresaid contract, but only the " lands and teinds, still, the pursuer being also possessed of the " character of heir, the contract passed to him as heir, and he " is, therefore, *in titulo* to sue upon it. The Lord Ordinary has " not been able to arrive at the conclusion that the pursuer's " title can be supported on this ground. He conceives that, to " the transmission of the contract, it is necessary that the pur- " suer shall connect himself with it, either by sufficient assigna- " tions, or a sufficient assignation thereof, or by showing that " some title has been made up capable of carrying and trans- " mitting it from James Sinclair down to himself. It is thought " that the pursuer has not satisfied either of these alternatives.

" The Earl of Breadalbane had conveyed the superiority of " Lybster to Sinclair of Ulbster, and it subsequently came to " be vested in Captain Gunn of Braemore;—and the first link " in the progress of transmission is a precept of *clare constat*, " (17th February, 1768,) by Captain Gunn, as superior, in " favour of Alexander Sinclair, as the heir of James Sinclair, " the disponee in Lord Breadalbane's charter, upon which " precept Alexander was infeft (13th September, 1768). The " Lord Ordinary is of opinion, that by this title the personal " contract to relieve the teinds, and James Sinclair, and his " heirs-male, whom failing, his heirs whatsoever, of stipend and " augmentations thereof, could not be carried to Alexander " Sinclair. Assuming that some form of title was necessary,

" then—whatever may be the proper form—it is conceived that " a precept of *clare* was not an apt or appropriate one. It " could apply only to the feudal estate,—to the lands and teinds " in which James Sinclair was infeft; and a title to them having " been completed, in virtue of it, there might pass to the heir " all obligations therewith connected, which run with the lands " and teinds, such as that of warrandice; but there could not " be thereby transmitted an obligation or contract of the nature " and kind which that in question has been found to be, over " which Captain Gunn, as superior, had no power whatever. " For that purpose, it was not a *habile* form of proceeding. It " is true, that, in the precept, the original contract of vendition " and the charter 1691 are referred to; and had the precept " been granted by Lord Breadalbane, the obligor in the contract " sued on, or his representatives, there might have been room " for argument that there was a renewal of the obligation or " contract; but the communication of the contract would then " have stood upon a totally different ground from that on which " it has, in the circumstances, been rested.

" The next step in the progress of transmission is a disposi- " tion of the lands and teinds of Lybster, by Alexander Sinclair, " to Captain Patrick Sinclair, his eldest son, of 11th June, 1774, " and infeftment thereon (20th October, 1774). Now, assum- " ing that the contract for protection and relief from stipend " and augmentations had been transmitted to Alexander, was it, " by the above title, transmitted from Alexander to Captain " Patrick? It will be observed, that while Alexander, the dis- " poner, reserved his own liferent, Patrick, the disponee, was " infeft shortly after the date of the disposition. The title of " Patrick, as founded on this disposition, although he might be " heir of Alexander, was a singular title. In the disposition, " neither the contract of vendition 1691, nor the original charter, " are mentioned. It contains an assignation to the writs and evi- " dents ' of and concerning the lands and others above disponed,'

" but no express assignation to the contract of relief from stipend " and augmentations. In this state of matters,—and taking it " to be clear, that, as urged by the pursuer, it must have been " Alexander Sinclair's intention, along with the lands and teinds, " to transfer to Patrick the contract of relief,—the Lord Ordin- " ary does not see how, consistently with the decision in the " case of Horne, it can be held, that, by the disposition as " framed, and the title completed under it in the person of " Patrick, the contract was assigned or transferred to Patrick. " And if it was not, then it is unnecessary to advert particularly " to the subsequent steps in the progress of title, which consist " of the title completed by the pursuer, the whole being built " upon the title of Patrick; and it being, as it is thought, " abundantly manifest, that, if the contract had not passed to " Patrick, it could not, through the medium of the titles after- " wards made up by the pursuer, be transmitted to him.

" Upon the whole, therefore, and without entering more " fully into the question, or the arguments of the parties, which, " in reporting the case, appears to be unnecessary, the Lord " Ordinary is humbly inclined to be of opinion, that the pur- " suer has not connected himself with the contract of relief; " and in that view, the other and separate points which have " been discussed in the papers do not call for any remark.

" It may, however, be proper to advert to a plea which, in " reference to the question of title, the defender has raised upon " the form of the summons, as being so laid that the only title " on which the pursuer can be heard to insist, in the present " action, is that of heritable proprietor of the lands and teinds " of Lybster. This, it is apprehended, is too critical. The " summons expressly bears, 'that the said lands and estate of " ' Lybster, with the teinds and pertinents, have since that date,' " (that is, since 17th September, 1691,) 'been feudally vested " ' in the pursuer and his ancestors, under successive renewals " ' of the said investiture;' and this is farther explained in the

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" Record, by reference to the titles produced—(see Re-revised " Condescendence, articles 6 and 7, and the Pleas in Law)— " so that there would rather seem to be enough to admit of the " pursuer maintaining his title to insist, upon all or any of the " grounds founded on in his revised case."

The Court (16th January, 1844,) pronounced the following interlocutor:—" Repel the first, third, and fifth pleas in law for " the defender, as stated in the closed record, and also repel " the fourth plea of prescription stated by him, except in so far " as applicable to the old stipend payable by the pursuer for " his said lands and teinds, and to those portions of stipend " payable under augmentations granted forty years before the " raising of this action; and, *quoad ultra*, remit to the Lord " Ordinary to proceed in the cause accordingly."

The appeal was against this interlocutor.

*Mr. Solicitor-General* and *Mr. James Russell* for the Appellant. The judgment of this House in *Maitland* v. *Horne*, *ante* 1, p. 62, where the clause upon which dispute arose was one very similar in its terms to that upon which the present question has arisen, fixes definitively that the obligation which was imported into the clause of warrandice in the contract of sale 1691, was not one of warrandice, but of an entirely distinct collateral nature—an obligation which might be enforced or be extinguished without the title to the lands or the teinds having been in question—an obligation for relief or indemnification against any charge to which, from its nature, the property was by law subject, being afterwards imposed upon it, in addition to those which had already been imposed at the date of the contract.

II. This obligation being, then, no way a component or essential part of the title, but distinct and collateral, might or might not have been inserted in the charter that was to follow upon the contract. The stipulation, no doubt, was, that it

should be inserted; but it was within the power of the parties, in the preparation of the charter, to vary the original contract, which was merely preliminary to that which was to be perfected by the charter. In the charter this obligation was not inserted, either by a distinct substantive clause, or as part of the clause of warrandice. It is possible to say that there are words of reference in the charter, which may embrace it; but that is an explication which can scarcely be allowed where the contract is express in stipulating that the obligation should be articulately inserted in the charter. The plain inference from the omission of such insertion is, that the contract was intentionally departed from and varied in this respect. The charter, therefore, as the last formal deed executed, is the one which must regulate the rights of the parties, and control the contract, which was prior to it. *M'Lachlan* v. *Tait*, 2 *Sh.* 267; *Leslie* v. *Moray*, 5 *Sh.* 264.

III. But if the obligation be subsisting, there is no evidence of its transmission to the respondent, so as to give him a title to sue upon it. The judgment in *Maitland* v. *Horne* not only declared the nature of the obligation to be collateral to the sale of the lands and teinds, but that an assignation was necessary to its transmission. The precept of *clare constat*, by Gunn, in favour of Alexander Sinclair, was strictly of a feudal character. It ascertained the character of heir, and was simply a warrant for infefting the party in the lands and teinds, but it did not give an active title in regard to any other subject. *Ersk.* III. 8, 71. It could neither give title to a personal obligation, nor operate as a transference of it in any way. No doubt there is a reference in the precept to the contract of sale, in the clause which declares that the lands and teinds are to be held and enjoyed under the conditions and provisions of the contract, that would not, if the clause stopped there, operate as a transfer of this collateral obligation; but the clause goes on to specify the conditions to be those recited in the charter, which is silent

upon the subject. Gunn, the granter of the precept, had no interest in or power over this personal obligation, so as in any way to regulate its transmission, even if the precept had been an instrument which, either from its nature or terms, could have embraced it. If the precept did not transfer the obligation to Alexander Sinclair, then there was no other title to which a right in him to the obligation could be ascribed, so as to make it transmissible by him.

Accordingly, the disposition by Alexander to Patrick Sinclair in 1774, is silent as to this obligation. All that is conveyed are the lands and teinds, as described in the precept; neither the contract nor the charter are referred to. No doubt it contains an assignation to writs and evidents, but only "of and "concerning the lands and others above disponed." So that it is not a general assignation, and even if it were, it would not be sufficient for the purpose contended for *Graham* v. *Don*, 15 *Dec.* 1814, *F. C.*; *Hamilton Montgomery*, 12 *Sh.* 349; and *Maitland* v. *Horne ut supra*. The only remaining link in the title is the charter of confirmation and precept of *clare constat*, in favour of the respondent himself. This was merely a renewal of the investiture of the lands and teinds in the person of the respondent, as it had stood previously in Alexander and Patrick Sinclair.

IV. If none of these deeds have transferred the obligation, the mere character of heir, supposing the respondent to have established that in his person, will not entitle him to it. Heirship will entitle the party to all covenants running with the land; but *Maitland* v. *Horne* has established that this obligation is not of that nature. Being an independent personal obligation, it must be transferred by the forms requisite for the transmission of personal obligations. But even if heirship would transmit the obligation, it is out of the question; for the disposition by Alexander to Patrick cuts off any pretence to the character of heir to Alexander, or to those who preceded him. The respon-

dent may in fact be the heir; but he has not shown himself to be so.

Indeed, in his summons, the only character in which the respondent sets up a title, is as "heritable proprietor," "feudally "vested;" but *Maitland* v. *Horne* has already determined that the obligation is one which does not run with the land; and unless it do, the simple fact of the respondent being heritable proprietor, feudally vested in the lands, can neither create a title, nor benefit a defective one.

*Mr. Crawford* for the Respondent.—I. The judgment of the Court below is no way inconsistent with the judgment of this House in *Maitland* v. *Horne,* which was rested upon the specialties of that case. The obligation not only occurs in and forms part of the clause of ordinary warrandice, but is in itself essentially an obligation of warrandice, and is not susceptible of any other character. An estate in teind is not only liable to be defeated like an estate in land, from a defect of title, but it is likewise, from its very nature, subject to be defeated by augmentation of stipend, which is an eviction of the subject itself. The terms used in the first part of the clause of warrandice are appropriate for securing the purchaser against such an eviction, and is strictly of the nature of warrandice, *Stair* II. 3. 46.

With regard to the declaration at the close of the clause of warrandice, it is not any separate obligation; it merely limits and explains the exception from the warrandice which precedes it, and, in truth, is mere surplusage; it but repeats what was already expressed in the part preceding the exception; for if in that part the granter was bound to warrant against augmentations of stipend, as *ex necessitate* he could not prevent their being made, this could only mean that he was bound to relieve the grantee of them when made, and that is all that the declaration itself imports. The observation of *Lord Cottenham,* in giving judgment in *Maitland* v. *Horne,* that the contract there was

very different from what was understood by the term warrandice, was not directed to the nature of the specific clause as importing warrandice or not, but had reference to the transmissibility of the obligation, whatever its nature might be, along with the land. That the clause is one of warrandice, has been settled by various decisions in which that effect has been given to clauses of a similar nature Plenderleath *v.* Tweeddale's Representatives, *Mor.* 16639; Alexander *v.* Dundas, 9 June, 1812; Hopetoun's Trs. *v.* Copeland, 8 December, 1819.

II. The charter which was granted in implement of the contract was not granted *ex intervallo*, in which case there might, perhaps, have been room for an argument that the obligation of warrandice had been dropped in it, but professing to be made in implement of the contract, it is made upon the same day *unico contextu* with the contract. It is impossible, therefore, to contend that the clause in the charter binding the granter to warrant the lands and teinds in form and effect according to the tenor of the contract, and under the provisions and conditions contained in it, is any other than an adoption by reference of the clause in the contract. Even if this were doubtful, the charter must be read against the granter, and those who represent him. By the contract, he undertook to insert this warrandice in the charter; and, therefore, the terms he used in the charter, which were of his own choosing, must be construed as intended to fulfil this undertaking in the absence of any warrandice different from, or which can be held as superseding, that in the charter.

III. The respondent has, by the deeds which have been produced, established his right to the character of heir of the original grantee. The only effect of the disposition of 1774, which was for love, favour, and affection, was to propel the succession of the lands to the disponee during the life of the disponer, of whom the disponee was the heir; it was, in fact, another way of completing the title. In each of the precepts

of *clare constat*, which form the links of the title, express reference is made to the contract of sale as the rule and measure of enjoyment of the lands and teinds; and the disposition of 1774, though it does not refer to the contract, contains a general assignation of writs, which will embrace the contract. The respondent, therefore, having established in himself the character of heir of James Sinclair—of one of those heirs in whose favour the contract and chartar were conceived—is vested in all the rights transmissible from James Sinclair by succession. This obligation of warrandice is accessory to the enjoyment of the lands, and is not of value to any one but the holder of the lands.

[*Lord Campbell.*—What do you say is the nature of this obligation? Is it real or personal?]

It is a personal one, so closely tied to the land as to go along with it.

[*Lord Campbell.*—What is there in the precept of *clare constat* that carries the right to it?]

The obligation is by the superior to the vassal and his heirs. The precept is by the superior, and declares who is the heir. An obligation upon the vassal to keep up houses, would subsist against his heir taking a precept. According to Carmichael *v.* Anstruther, an obligation by a superior will transmit against his heir, not his executor, and so the benefit of it must transmit to the heir, not the executor of the vassal.

[*Lord Cottenham.*—According to that, then, it is a covenant running with the land?]

No. It is not a real contract.

[*Lord Cottenham.*—Then it is a personal one. And can it be transmitted as this is said to have been?]

It is a personal contract inserted in the charter.

[*Lord Campbell.*—How do you get it passed from James to Alexander?]

Warrandice, unless fortified by warrandice lands, is per-

sonal, no doubt, as against the obligor, but it is real as to the succession of the obligee. It could be taken up only by general service, not by confirmation.

[*Lord Campbell.*—How then does it get to a singular successor?]

That was the question in Maitland *v.* Horne. There the party had neither title as heir, nor by assignation, and claimed merely because of his possession of the lands.

[*Lord Campbell.*—Can you take a personal obligation to A. and his heirs-male, which will entitle the heir-male to sue?]

It is an incorporeal right annexed to a real subject, as stated in *Bell's Principles;* it has *tractum futuri temporis*, and so is heritable. In Nisbet *v.* Halket, *Mc L. & Rob.* 52, the obligation was not treated as a personal one. In Plenderleath *v.* Tweeddale's Representatives, where the heir was pursuer, it was assumed that warrandice of teinds went to the heir; and this was also assumed in a variety of other cases.

A full argument was heard from both sides of the bar upon the question, whether the claim upon the clause in question was cut off by the negative prescription, but as the judgment passed bye that question, the argument has not been given.

LORD CAMPBELL.—My Lords, in this case this was an action of declarator, relief, and payment, brought by James Sinclair against the Marquis of Breadalbane. The pursuer, in his summons, describes himself as "heritable proprietor of the lands of Lybster, with the teinds and pertinents thereof," and sets forth a contract of vendition and sale entered into in the year 1692, between John, Earl of Breadalbane, and James Sinclair, said to be the pursuer's ancestor, of the lands of Lybster, with the teinds and pertinents thereof, with a stipulation that the charter should contain a clause of warrandice, whereby the said earl and his heirs were to warrant the said

lands and teinds to the purchaser and his heirs and successors against (among other things) minister's stipends and augmentations thereof, and that a charter in consequence was granted by the said Earl of Breadalbane, of the said lands and teinds in implement of the said contract; that the said lands and estate of Lybster, with the teinds and pertinents, have since that date been feudally vested in the pursuer and his ancestors under successive renewals of the said investiture; that since the said contract and charter, sundry augmentations of the stipend, payable to the minister of the parish of Latheron for the said lands of Lybster have taken place, viz., in the years 1722, 1791, and 1824; that in consequence the pursuer and his authors have been under the necessity of making payment to the said ministers of Latheron of the augmented teind duties effeiring to the said lands of Lybster; and that the Marquis of Breadalbane, the defender, who now represents the said Earl of Breadalbane, has refused to relieve the pursuer from the said augmentations. The prayer of the summons is, that the defender might be decreed to repay to the pursuer, as heritable proprietor of the said lands and teinds of Lybster, the money, victual, &c., which the pursuer and his predecessors have paid in respect of the said augmentations.

The defender pleaded (among other pleas in law) that the pursuer has not produced a sufficient title to enable him to found a claim of relief.

The Lord Ordinary (Lord Wood) made avizandum of the case to the Second Division of the Court, with a note intimating his opinion that the pursuer had not sufficiently connected himself with the contract of relief.

When the case came to be decided, Lord Moncrieff agreed with the opinion of Lord Wood, but the Lord Justice Clerk, Lord Medwyn, and Lord Cockburn, being of a contrary opinion, an interlocutor was pronounced, which repelled the pela I have stated, with others, and remitted the cause to

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the Lord Ordinary to proceed on a plea denying that the defender represents the party to the contract.

Against this interlocutor there is an appeal to your lordships, and I am of opinion that it ought to be reversed. But, my Lords, I by no means yield to the argument urged for the appellant at the bar, that the obligation sued upon is a mere personal contract, which, upon the death of James Sinclair, to whom it was given, went by confirmation to his executors. This might be so by the law of England, yet it seems quite clear that by the law of Scotland such an obligation does not go to executors, although it may be so far collateral as not necessarily to pass with the land or teinds to singular successors. It does not come within the definition, in any Scotch law-book of authority, of things which go to executors; there never has been an instance of executors sueing on such an obligation; and whatever difficulties have been started as to the mode of its transmission, I believe that no Scotch lawyer has ever supposed that it was part of the personal estate of the grantee.

I beg leave likewise to mention that I am not influenced by the argument that the warrandice is not introduced at length into the charter by the Earl of Breadalbane, for I think that this charter contains words expressly and specifically referring to the warrandice in the contract, which must be considered as embodying it in the charter according to the common maxim, "verba relata inesse videntur."

I arrive at the conclusion that the defender is entitled to be assoilzied, from the manner in which the pursuer has shaped his case in his summons, and the manner in which he has supported it by proof. Now, my Lords, the right in which the pursuer makes this demand, I think, is only as heritable proprietor of the lands of Lybster, with the teinds and pertinents thereof. At the time when this action was commenced, a notion seems to have prevailed in Scotland that such a warrandice against augmentation of stipend, like a warrandice of title,

passed with the land to singular successors, and upon this notion the summons seems to have been framed. There is no allegation in the summons, that the pursuer is heir of the grantee, or any statement how he is heir, or any claim in the capacity of heir. The grantee may be his ancestor, and all the averments of the summons may be true, and yet he may not represent the grantee as heir. He alleges, and he has proved that he is heritable proprietor of the lands of Lybster, with the teinds and pertinents thereof. But in the case of Maitland *v.* Horne, this House held that an obligation by a disponer of lands to relieve the disponee of all future augmentations of stipend, does not, without a special assignation, pass to singular successors. Here no such special assignation is alleged and proved. That decision has been complained of, but it is binding on this House as well as on the Courts below, and I think it is inconsistent with the interlocutor appealed against.

But, still further, if it were thought that the pursuer's summons, aided by his condescendence, amounts to an allegation, that he claims as heir-at-law of the grantee of the obligation, I do not think that his proof is sufficient to sustain his allegation. I entirely adopt the reasoning upon this point of Lord Wood, to be found in 16 *Bell & Murray* 384, where his lordship investigates the pursuer's title as proved in a very clear and accurate manner, and shows, to my entire satisfaction, that the pursuer does not sufficiently connect himself with the contract, either as heir or as singular successor.

Taking this view of the case, I do not feel it necessary to offer any opinion upon the plea of prescription, or upon any other question which has been raised in the case.

Supposing that such obligations continue unaffected by lapse of time when they are to be enforced, the pursuer should be held to considerable strictness of allegation and of proof. Being revived after having long lain dormant, they have a tendency to produce much vexation and much litigation from

the difficulty of finding who are to sue and be sued upon them, and the remedy over, by way of indemnity, which may successively be obtained by those who are found liable.

Upon the whole I move your lordships that the interlocutor appealed against be reversed, and that the defender be assoilzied from the conclusions of the summons.

LORD CHANCELLOR.—My Lords, having had the benefit of seeing the opinion of my noble and learned friend, which he has now stated to the House, I entirely concur with him in the view he has taken of the case, and it is not necessary therefore for me to enter into it.

LORD BROUGHAM.—My Lords, I have not read the judgment of my noble and learned friend, but I recollect the case perfectly. I attended at the hearing, and it appeared to me to be a case of the greatest importance, as it respected the Scotch practice, and I certainly did incline at the time, very strongly incline, to think that the interlocutor appealed against was wrong, my mind going along with the reasoning of the learned Lord Ordinary, (Lord Wood;) that was my impression at the time, my Lords; and I recollect having so very strong an opinion on the subject, that I suggested to my noble and learned friend near me, who first spoke, who presided upon the occasion, that we might dispose of it then; but as we were to reverse the judgment of the Court below, it was deemed necessary to take a little time to consider it, as we always naturally look more minutely into a case when we differ from the learned Judges of the Court below.

My Lords, I put the question of the plea of prescription entirely out of my view; I do not at all consider that the argument upon the pleas of prescription is necessary to be disposed of, for the reasons given by my noble and learned friend, in order to arrive at the conclusion at which I have

arrived. I, therefore, entirely agreeing in the argument, and taking the same view of the result with my noble and learned friend, am of opinion with him, that we ought to reverse this judgment.

It is ordered and adjudged, That the interlocutor complained of in the said appeal be, and the same is hereby reversed, and that the defender in the action to which the said appeal relates be assoilzied from the conclusions of the summons.

GRAHAM, MONCRIEFF and WEEMS—G. and T. W. WEBSTER, Agents.

[HEARD 11*th June*.—JUDGMENT 14*th August*, 1846.]

DAVID ALLAN and JOHN SMITH, heirs-at-law of ROBERT GLASGOW, of Mountgreenan, deceased, *Appellants*.

ANNE ROBERTSON GLASGOW, and others, *Respondents*.

*Revocation.—Trust.*—A trust settlement conveyed the whole of the granter's estates to trustees for specified purposes. A posterior settlement likewise conveyed the whole estates to a different set of trustees and for different purposes, but omitted, in regard to a particular estate, to give a power of sale, which was necessary for carrying the trusts into effect; and revoked all prior deeds "in so far as the same may be inconsistent with these presents." A former judgment of the House having declared that the trustees of the second deed had not power to sell the particular estate, or perform the trusts in regard to it, *held* that, the first deed was not revoked as to this estate by the second deed, but subsisted to the exclusion of the heirs-at-law of the granter claiming the estate in that character as undisposed of.

ROBERT GLASGOW, by deed bearing date the 30th day of April, 1802, conveyed to trustees all the lands and real estate in Great Britain then belonging to him, or which should belong to him at the time of his death; also his whole lands and plantations in the West Indies; and, generally, his whole estate, real or personal, heritable and moveable, wheresoever situate, then pertaining, or which at the time of his death should pertain to him, and particularly without prejudice to this generality, his lands of Mountgreenan. The parts of this deed which it is necessary to notice, were expressed in these terms: "the said trustees or their quorum, as hereafter appointed, "or the survivor of them, are hereby fully authorized and "empowered, after my death, to sue for, recover, receive and "discharge all the outstanding debts which may be due to me,

" and to wind up, manage and settle all my concerns in trade, " or business of every kind, whether in Great Britain, the " West Indies, or elsewhere, in such manner as they shall " judge most advantageous, and to sell, dispose of, and convert " into money, if they see necessary, my said real and personal, " heritable and moveable subjects and estates, in whole or in " part; and that either by public or private sale, at such prices " and on such conditions as they shall judge adequate, the pur- " chaser or purchasers being noways concerned with the appli- " cation of the prices. Declaring always, that the above " written disposition of my lands and estate of Mountgreenan " is granted without prejudice to the settlement and destination " thereof in favour of the heirs of provision specified in the " contract of marriage between me and the said Mrs. Rachel " Dunlop, dated the 6th of February last, it being my meaning " and intention, that the above written trust-disposition, so far " as respects or may be extended to my said estate of Mount- " greenan, shall take effect only in the event of the failure of " the heirs of provision of my own body therein specified; and " further providing, as it is hereby specially provided and " declared, that the said trustees shall be bound, as by accepta- " tion hereof they become bound and obliged, to apply and " appropriate the prices and produce of my said estates, real " and personal, heritable and moveable, above conveyed, and " whole profits and produce which may arise therefrom, and " which may be recovered and intromitted with by them as " follows:—In the *first* place, for paying all my just and lawful " debts, including the provisions contained in the foresaid " marriage-contract entered into between me and the said Mrs. " Rachel Dunlop; together with my funeral expenses, and the " whole charges which may attend the execution of this trust, " as the same shall be ascertained by the subscribed account of " the disburser: In the *second* place, for payment of the " respective sums of money and annuities aftermentioned,

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" which I hereby leave and bequeath, and bind and oblige me, " my heirs and executors, to pay to the persons after named, as " follows, viz.: In the *first* place to Miss Anne Glasgow, my " reputed natural daughter by Mrs. Anne Swan, and who has " generally resided with me, and is now boarded at Mrs. " Hope's house in Edinburgh, and to the lawful heirs of her " body, the sum of ten thousand pounds sterling, and that at " her marriage or majority, whichever of these events shall first " happen, with two thousand pounds sterling of liquidate " penalty in case of failure, and the legal interest of the said " principal sum of ten thousand pounds yearly from and after " my decease, until the foresaid term of payment, and there- " after until payment of the same." Then followed a variety of other legacies " and it is hereby provided and declared, " that after answering and fulfilling the before-mentioned " preferable uses and purposes of this trust, the whole " free residue of my said estates, real and personal, heri- " table and moveable, shall fall, accresce and belong, and the " same is hereby destinated to, and the said trustees are " appointed to denude themselves thereof, and to convey and " make over the same, to and in favour of the heirs to be pro- " created of my body, and succeeding or having right to succeed " to me in my lands and heritable estate, in terms of the desti- " nation contained in the foresaid marriage-contract entered " into between me and the said Mrs. Rachel Dunlop, my wife; " whom failing, to and in favour of the heirs whatsoever to be " lawfully procreated of my body; whom failing, to and in " favour of the said Anne Glasgow, my reputed natural " daughter, and the heirs whatsoever of her body; whom " failing, to and in favour of the said William Cochrane, " younger of Ladyland, my nephew, and the heirs whatsoever of " his body; whom failing, to John Cochrane, my nephew, " younger brother of the said William Cochrane, and the heirs " whatsoever of his body; whom failing, to be divided equally

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"among all my lawful nephews and nieces, and the lawful heirs "of their bodies, share and share alike, and that *per stirpes*, the "child or children of such of my nephews and nieces who may "have died, succeeding only to the share which would have "belonged to their respective parents, if still alive." This deed contained an obligation to infeft and precept of sasine in ordinary form.

In the year 1818, Glasgow executed an entail of his lands of Mountgreenan, and on the 23rd June, 1821, he executed four several deeds. The first was a supplementary entail of the lands of Mountgreenan. Neither in this entail nor in that of 1818, was Anne Glasgow called, though her husband, Mr. Robertson Glasgow, and the issue of their marriage, were heirs substitute.

Another of the deeds was a trust-disposition and settlement, which after referring to the entail, continued thus: "And "whereas it is my intention to enlarge the said estate by "further purchases, and in particular, that whatever monies, "whether heritably secured or otherwise, or other personal "estate, may at my death belong to me in Scotland, (excepting, "as after-mentioned,) shall be appropriated for the purchase of "lands, or other hereditaments lying as near to my said lands "of Mountgreenan as can be had; and that the said lands and "additional purchases shall be settled upon the same series of "heirs upon which I have already settled my said lands and "estate of Mountgreenan and others, and under the same species "of entail."

By this deed the granter conveyed to a set of trustees entirely different from that contained in the deed of 1802, "all "and sundry lands and estate, heritable bonds, adjudications, "and all other heritable subjects of whatever kind or denomi-"nation pertaining and belonging to me, or which shall pertain "and belong to me at the time of my decease, in Scotland, (but "excepting always herefrom the foresaid lands and estate of

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" Mountgreenan and others in Scotland, contained in the fore-
" said deeds of entail executed by me of the dates before men-
" tioned); and also such lands and estates to which I have
" succeeded or acquired right, and hold under settlements of
" strict entail: And further, I do hereby assign, convey, and
" make over, to and in favour of my said trustees, or to such of
" them as shall accept of the present trust, and the survivors or
" survivor of them, and such other person or persons as I shall
" appoint, or as they shall assume into the said trust as afore-
" said, all and sundry debts and sums of money, both heritable
" and moveable, presently pertaining and belonging, and due
" and owing, or which shall pertain and belong, and be due and
" owing to me in Scotland at the time of my death, by bond,
" bill, contract, decreet, account, or in any other manner of
" way whatever, and also all goods, gear, corns, cattle, and
" every other subject of personal estate, of whatever nature or
" denomination, pertaining now, or which shall happen to per-
" tain and belong to me at my death, wherever, or in whose
" custody soever, the same may be in Scotland, (excepting in
" so far as the same is hereinafter specially conveyed,) with the
" whole vouchers, instructions, and conveyances thereof, writs
" and deeds granted, and diligence and execution used and
" obtained for payment or security of the same:" and for making his conveyance more effectual, he appointed the trustees to be his executors.

The purposes of this trust necessary to be noticed, were " *First*, to the end that my said trustees shall, out of the " produce of my said means and estate, pay all the just and " lawful debts which shall be due and owing by me at the time " of my death, together with my funeral expenses, and shall " also pay and discharge all such legacies, donations, annuities, " and provisions which I have already left and bequeathed, or " become bound for, or shall hereafter leave, bequeath, or " become bound for, to and in favour of any person or persons

" whatever:" then followed three legacies. " *Secondly*, To " the end that my said trustees or trustee, and the acceptors or " acceptor, and survivors or survivor of them, or the majority " of them, do and shall, as soon after my death as conveniently " may be, and as they shall think proper, make up and estab- " lish in their persons, as trustees aforesaid, such titles as may " be necessary to my said real and personal estates, hereby " conveyed:—*Thirdly*, To the end that my said trustees shall, " at the first term of Whitsunday or Martinmas which shall " ensue after the expiry of a twelvemonth from the period of " my death, cause make up a state of the trust-estate under " their management, in order to show as nearly as possible the " free amount of my said estate, after deduction of my said " debts, and allowance for the expenses attending the execution " of the trust; and shall, from and after such term of Whit- " sunday or Martinmas, account for and pay over, yearly and " proportionally to the heir of entail in possession, for the time, " of my said estate of Mountgreenan and others in Scotland, " contained in the deed of entail executed by me, of the dates " before mentioned, such a sum as shall be equal to the interest " upon what shall so appear to be the free residue and amount " of my said estate, and that until such residue, to be accumu- " lated and made part of the stock, shall be disposed of in " manner after-mentioned:—*Fourthly*, To the end and intent " that my said trustees or trustee shall, as soon as they shall " have it in their power, from the state of the trust-funds, and " as they shall think proper, appropriate and apply such " produce or proceeds of my real and personal estate, hereby " conveyed, to the purchasing of lands or other heritages in " Scotland, lying contiguous, or as near as may be to my said " lands and estate of Mountgreenan in Scotland, as such pur- " chases can be met with, and most conveniently and advanta- " geously made, and take the rights of the lands and other " subjects so to be purchased by them, to and in favour of

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" themselves and the survivor of them, as trustees, for the ends, " uses, and purposes particularly before and after mentioned:— " *Fifthly*, To the end that my said trustees or trustee shall, " immediately upon making the said purchases, and having " their titles thereto completed, or as soon thereafter as can be, " make and execute a deed of entail of the said lands and others " so to be purchased by them, settling and disponing the " same in strict conformity with the two entails of Mount- " greenan:—*Sixthly*, After the residue or free reversion of my " said estate shall be so invested in the purchase of lands and " heritages, and the same settled and secured in manner fore- " said, I appoint my said trustees to denude of this trust, and " to pay over any balance in their hands, and to deliver over to " the said heir of entail in possession for the time of the said " estate of Mountgreenan, and others in Scotland, the whole " title-deeds of the lands so purchased by them, together with " the vouchers and discharges of the debts and other obligations " they may have paid in the execution of the trust, and all " other writings and papers connected with the same, my said " heir of entail being bound, at his expense, upon delivery of " the said accounts, titles and documents, to grant to the said " trustees a full legal discharge of their actings and intromis- " sions, and which account shall be rendered upon the honest " word only of the said trustees."

This deed contained an obligation to infeft and precept of seisin, and concluded with this clause, upon which the question in the appeal mainly turned: " And I do hereby revoke all " other former deeds of settlement executed by me, in relation " to my real and personal estate and effects, herein-before con- " veyed, in so far as the same may be inconsistent with these " presents, excepting the said two deeds of entail, and a will, " conveyance, and lease, after the English form, made and " executed by me, relative to my personal estate in England, " or the West Indies, and my property there, all of the date of

"these presents; reserving always to myself full power and "liberty, at any time in my life, and even in the article of "death, to revoke, alter, or innovate these presents in whole or "in part, and to make such additions thereto, and alterations "thereon, as I may from time to time think proper; but "declaring that the same, so far as not altered by me, shall be "effectual, albeit found lying in my custody at my death, or in "the custody of any person to whom I may see fit to entrust "the same, undelivered, with the not-delivery whereof I hereby "dispense for ever."

Another of the deeds referred to in this clause was a lease, and release in the English form, which was in favour of the same persons as the disponees in the trust-disposition and settlement, and gave them power to sell the granter's West India estate, and after payment of the expenses out of the proceeds, and of any legacies he might have then given, to invest the residue in the purchase and entail of lands, in the same terms as expressed in the trust-disposition and settlement in regard to the property thereby conveyed.

The last of the four deeds was a will in the English form, giving a variety of legacies of different amounts to different persons from those contained in the deed of 1802, and devising his whole estate, real and personal, out of Scotland, to the persons trustees in the trust-disposition, upon trust to sell the property, and after payment of the legacies to invest the residue in the purchase of lands in Scotland, to be entailed according to directions in terms nearly similar to those contained in the trust-disposition, and the lease and release. By this will the testator gave Mrs. Glasgow Robertson and her husband an annuity of 3000*l.* a-year, and to the issue of their marriage a legacy of 30,000*l.*

The maker of these deeds died in the year 1827. At the period of his death he was possessed of a villa and lands adjoining, called Seafield, and likewise of other lands, all of which he held in fee simple.

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In 1829, the trustees under the deed of 1821 brought an action of adjudication in implement against the heirs-at-law of Glasgow, with the view of establishing in themselves a title to these fee-simple lands; and under a decree obtained in that action they made up a title by charter and infeftment.

In the same year, (1829,) the trustees brought an action of declarator against the heirs in the two entails executed by Glasgow and against his heirs-at-law in the unentailed lands, setting forth that the lands of Seafield were not embraced by either of the entails, and were not specially conveyed, although they were generally conveyed, by the trust-disposition of 1821; that it seemed to have been the intention of Glasgow to sell Seafield; and as these lands were distant from Mountgreenan, the entailed estate, and their management would be expensive and troublesome, they could not be retained without prejudice to the trust. The summons, therefore, concluded that it should be found that the trustees were entitled to sell the lands of Seafield, and to apply the price in the purchase of other lands contiguous to Mountgreenan, and to entail such new lands by a deed in conformity with the entail of Mountgreenan.

Upon the 7th of March, 1832, the Court of Session pronounced an interlocutor in these terms:—"Find and declare, "that, under the directions contained in the trust-disposition "and deed of settlement executed by the deceased Robert "Glasgow, esquire, the trustees have full power and authority "to sell and dispose of the lands of Seafield within mentioned, "for such price as can be obtained for the same by public sale: "Find and declare, that the said trustees have full power to "grant a valid and unexceptionable title to the purchaser of the "said lands, and to apply the free proceeds of the said lands in "purchasing lands to be settled and entailed, in terms of the "directions in the said trust-disposition and deed of settle-"ment."

But on the 1st of September, 1835, that interlocutor was

reversed by the House of Lords, upon appeal, 2 *Sh. & Mc L.* 333; and the Court of Session, applying this judgment of the House of Lords, sustained the defence, for the heirs-at-law of Glasgow, and dismissed the action.

Thereafter, in September, 1836, the appellant, one of the heirs-at-law of Glasgow, brought an action of declarator against the trustees under the trust-disposition 1821, the summons in which action set forth the proceedings in the action, at the instance of these trustees, which have been detailed; that the trustees had no power to sell Seafield, or any other lands conveyed by the trust-disposition, or to apply the price for the purpose of entailing other lands, or to bring these lands within the operation of the trust-disposition, but that they held them in trust for him and the other heirs-at-law of Glasgow; and concluding that it should be found that the trustees held Seafield, and the other lands, for behoof of and under an obligation to account to him and the other heirs-at-law of Glasgow, and to denude thereof in their favour; and that he, as heir-portioner of Glasgow, had a right to a *pro indiviso* share of the lands; and that the trustees should be decerned to denude of the lands, and cede possession thereof to him as such heir-portioner *pro indiviso*, and to grant all deeds necessary for vesting him with a good title.

The trustees, on the other hand, brought a multiplepoinding and exoneration of the rents of the lands against the heirs-at-law and the heirs of entail, which was conjoined with the action at the instance of the appellant.

In these conjoined actions, a condescendence and claim were lodged for the heirs of entail and the legatees and annuitants, founded upon the deed of 1821. A separate claim was likewise lodged by Anne Glasgow, now Anne Robertson Glasgow, the respondent, founded upon the trust-disposition of 1802, and the residuary gift in her favour, on failure of heirs of the body of the maker, an event which had taken place.

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The Court ordered cases prepared by the parties, to be laid before the consulted Judges. These Judges were divided in opinion; and the Court, at advising their opinions, was also divided; but, in conformity with the opinion of the majority, it pronounced the following interlocutor on the 28th January, 1842:—"In conformity with the opinions of the majority of "the whole Judges, sustain the claim in the multiplepoinding "of Mrs. Anne Glasgow, spouse of Robert Glasgow, esquire, "of Mountgreenan, and him for his interest, under the deed of "the late Robert Glasgow, esquire, of Mountgreenan, dated "30th April, 1802 years, without prejudice to any questions "which may arise between the said Mrs. Anne Glasgow and "the trustees appointed by the trust-deed of the said Robert "Glasgow, deceased, dated 23d June, 1821, or the parties "beneficially interested in that trust-deed: Repel the claims of "Hugh Allan and John Smith, and dismiss the same; assoilzie "the defenders from the whole conclusions of the summons of "declarator count and reckoning raised at the instance of "the said Hugh Allan, and *quoad ultra* find it unnecessary to "pronounce any other finding on any of the pleas maintained "by the different defenders in said processes, or parties com-"pearing in the process of multiplepoinding."

The appeal was against this interlocutor.

*The Lord Advocate* and *Mr. Stuart* for the Appellant. The trust-deed of 1802 was a general settlement of the maker's whole estate. The trust-disposition of 1821, which must be taken in conjunction with the other deeds executed at the same time, was of the same character. It was a settlement of the granter's whole estate, wheresoever situated. Both the deed of 1802 and the deed of 1821 were effectual to vest the lands of Seafield in the trustees of either of these deeds; but the judgment of this House has determined, that after having been vested in the trustees of 1821, there are no powers in the deed

of 1821 which the trustees can exercise in regard to these lands; that, in fact, they hold a mere naked trust. If this state of the law in regard to the deed of 1821 had been ascertained prior to the time at which the trustees proceeded to make up their title to Seafield, the heirs-at-law, upon their title to the beneficial interest, might have successfully resisted that proceeding, as superfluous and unnecessary, and have established in themselves a title to the lands, to the exclusion of these trustees.

The trustees of the deed of 1802, in such a case, could not have intervened to prevent the heirs-at-law thus establishing their title, unless upon the ground that the deed of 1802 was subsisting.

But the deed of 1821 being, like the deed of 1802, a general conveyance of the granter's whole estate, its necessary effect was to destroy the deed of 1802. The deed of 1821 was effectual to vest the legal estate of Seafield in the trustees under it, although the beneficial interest in the trust was undisposed of. The legal estate feudally vested in them is beyond any challenge at the instance of the trustees of the deed of 1802. The legal estate, therefore, given by the deed of 1802 being gone, the beneficial interest built upon that estate fell likewise.

Not only was the deed of 1802 superseded and destroyed by the subsequent conveyance of the same estate, by the deed of 1821, to different parties, but it was revoked by the inconsistent purposes for which that subsequent conveyance was made. Not to go further than the respondent herself, the trusts of the two deeds were *toto cœlo* different. By the deed of 1802, she was to have, out of the general estate of the testator, a legacy of 10,000*l.* and the residue of the estate, after satisfying prior bequests. Whereas by the deeds of 1821, taken as one deed, she was, also out of the general estate, to have, along with her husband, an annuity of 3000*l.* and a life interest in the residue, after payment of bequests, different from those in the deed of 1802,

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life interest therefore in an entirely different residue from that intended by the deed of 1802. If this be so, then the clause of revocation of 1821 is in truth an express revocation of the deed of 1802, for it revokes all former deeds, "in so far as the same "may be inconsistent with these presents." And if the effect of the deed of 1821, as between the parties entitled to the beneficial interest under it, and under the deed of 1802, be to revoke the latter deed, the effect must be the same as between them and the heirs-at-law. The deed of 1802 cannot be gone, as to the parties who would have been entitled to take under it, had it subsisted, and yet have effect as a title to exclude the heirs-at-law.

There is no express reference in the deeds to the heirs-at-law, one way or other; yet, if there had been in the deed of 1821 a declared intention to exclude them, they would nevertheless be entitled to take, if that deed was an effectual revocation of the deed of 1802, although it might not be in itself an effectual disposition. *Crawford* v. *Coutts*, 2 *Bli.* 655. *Gordon* v. *Clines' Trustees*, *M'L. & Rob.* 72.

If the deed of 1821 would have excluded the trustees of the deed of 1802, what possible title can the respondent have? There is no conveyance whatever by the latter deed to her. It is only through the title of the trustees that she can assert any interest which the deed gives her—and even as to that interest it is gone—it is to a residue which never can have existence—it is a gift of residue of the general estate after payment of prior charges; but the general estate is given by the deed of 1821, and subjected to charges entirely different from those in the deed of 1802.

[*Lord Cottenham.*—Your argument, that the purposes of the deed of 1802 were substituted by the purposes of the deed of 1821, is not very consistent with your claim as heir-at-law on the ground that no purposes are declared by the deed of 1821.]

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Our claim is rested on this, that the necessary powers are not given by the deed of 1821 for effectuating its purposes. If the deed of 1802 is to be set up, it can only be by resuscitating the objects of it. The other legatees and annuitants must then be entitled to payment as well as the respondent, and can she claim the 10,000*l.* given by it, and at the same time take the benefits given by the deed of 1821? The confliction that will be occasioned by this course between the parties entitled to take under the two deeds, seems to have occurred to the Court below, and to have occasioned the reservation in the interlocutor complained of.

[*Lord Cottenham.*—By the deed of 1802 provision was made out of estates, Seafield included, for payment of debts and legacies. But by the deed of 1821, as you are now compelled to read it, provision for these purposes is made out of the other estates. Is not the effect of that just to relieve Seafield from the provision?]

But Seafield is vested in the trustees of 1821, who are entirely different from those of 1802.

[*Lord Cottenham.*—You must read the deed of 1821 as if the testator had said, out of the proceeds of my lands, except Seafield, do so and so. Won't that, on the supposition that the deed of 1821 conveyed all the lands, Seafield included, leave the trusts of 1802 to take effect, the deed of 1821, as to Seafield, only appointing new trustees?]

No reference is made from the one deed to the other, so that the trustees of the deed of 1821 could be cognisant of the trusts of the deed of 1802; there is nothing in the deed of 1821 that pointed out to the trustees of that deed that they should execute, in regard to Seafield, the trusts of the deed of 1802; and if the trusts of that deed are to be executed, there is no power to do so but in the trustees appointed by it; no such power is given to the trustees appointed by the deed of 1821.

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*The Solicitor-General* and *Mr. Bethel* were heard for the Respondent.

LORD CHANCELLOR.—My Lords, the contest in this case is between the heirs of Robert Glasgow and Mrs. Anne Glasgow, his natural daughter, the latter claiming under a settlement of 1802, the former insisting that such settlement was revoked by a subsequent settlement of 1821, although no new trusts were declared of the property in question, as was decided by this House, which no party therefore is now at liberty to dispute. But that decision only established that the property was not subject to the uses, ends, and purposes expressed in the deed of 1821; it left untouched the question whether it was at all affected by the deed of 1821, or whether the settlement of 1802 was revoked by it. That decision, however, so far assists in the construction now to be put upon the deed 1821, as it compels us to read the deed as if it contained an exception of the property in question; if that exception were introduced into the description of property to be affected by that deed, there could be no question as to the subsistence of the settlement of 1802; but it is consistent with the decision that the exception should only be introduced into that part of the deed which declares the uses, ends, and purposes for and upon which the property comprised in it was given in trust. The revocation in the deed of 1821 does not affect this question, because it only revokes "all former deeds of settlement in so far as the "same may be inconsistent with these presents," and it having been decided that the property in question was not subject to the uses, ends, and purposes declared by the deed of 1821, it follows that, as to this property, the provisions of the deed of 1802 cannot be inconsistent with those of 1821, any more than would have been the case if the deed of 1821 had in terms excluded the property in question.

I have before said that if the deed of 1821 were to be read

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as excepting the property in question, the claim of the heirs would necessarily be excluded; and it appears to me that introducing the exception in that part of the deed which declares the uses, ends, and purposes, is equally fatal. In that case, assuming that the property in question was, together with all other parts of the estate of Robert Glasgow, transferred to the new trustees, the declaration would be that those presents were granted in trust, (except as to the property in question,) for the uses, ends, and purposes after expressed, and no otherwise. The effect, therefore, would be, as to the property in question, to transfer it to new trustees, but not to affect the trusts and purposes upon which it was before held; and the revocation being, for the reasons before given, inoperative, the new trustees would hold upon the old trusts.

Whether, therefore, the property be considered as altogether unaffected by the deed of 1821, or as included in it only to the extent of vesting it in new trustees, it appears to me that the decision of this House, declaring that it was not subject to the uses, ends, and purposes declared by that deed, so preserved and set up the deed of 1802 as to exclude the claim of the heirs. This seems to have been the view taken by Lord Mackenzie, with whom the majority of the Judges concurred; and agreeing with him in this view of the case, I move your lordships that the interlocutor appealed from be affirmed, but the appellant suing *in forma pauperis*, it will be without costs.

LORD BROUGHAM.—My Lords, I am of the same opinion as my noble and learned friend. At the hearing of the case it was considered necessary that it should be looked into in order to see the bearing of the former judgment, I am of opinion that the Lord Ordinary, (Lord Mackenzie,) with whom the majority of the Judges agreed, came to a right conclusion. I therefore think that the interlocutor appealed from should be affirmed.

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LORD CAMPBELL.—I entirely agree in that opinion.

It is ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutor, in so far as is therein complained of, be, and the same is hereby affirmed; and that the said cause be remitted back to the Court of Session in Scotland, to do further therein as shall be just consistently with this judgment.

WALMISLEY—RICHARDSON and CONNELL, Agents.

[HEARD 18*th March*.—JUDGMENT 28*th August*.]

HIS GRACE HUGH, DUKE OF NORTHUMBERLAND and others, Trustees for behoof of the Right Honourable James, Lord Glenlyon, deceased, *Appellants*.

SIR J. A. B. M. MC GREGOR, *Curator Bonis* to his Grace John, Duke of Atholl, *Respondent*.

*Entail.—Faculty.*—A power given by an entail to the heirs to provide their younger children in three years' free rent of the lands is not well executed by a bond for payment to trustees of the amount of the rents, with directions to pay the *interest* only to the children, and to invest the *capital* in the purchase of lands to be entailed upon a series of heirs, including the children and *their* children.

*Ibid.—Ibid.*—A bond of provision executed under, but not in conformity with, a power in an entail will not be validated by a power given by the bond to the trustees in whose favour it was granted, so to modify the bond as that it should conform to the power.

*Ibid.—Ibid.*—A power reserved by an entail to the heirs under it cannot be delegated, but must be executed by the heirs themselves.

BY the original entail (1766) of the lands of Tullibardine, part of the possessions of the Dukes of Atholl, power was given to the heirs of entail to make provisions for their widows and younger children by a clause in these terms:—"Excepting and "reserving from the said prohibitive, irritant and resolutive "clauses, full power to the heirs and members of entail above "mentioned, in possession for the time, to grant lifetime infeft- "ments to their wives and husbands, and to the wives and "husbands of their presumptive heirs upon their respective "marriages, the said liferents being always by way of locality "only, and in lieu of their terce and courtesy, from which they "are hereby excluded, and each liferent not exceeding a third

" part of the said lands and estates, and pertinents thereof " aforesaid, so far as the same are free and unaffected for the " time with former liferents and real debts that may or shall " then affect the same; and also excepting and reserving power " and liberty to the heirs and members of entail above " mentioned in possession for the time, to provide their younger " or other children beside the heir, to three years' free rent of " the said lands and estates, so far as the same are free and " unaffected for the time with any liferents and real debts that " may or shall then affect the same."

On the 18th October, 1824, John, Duke of Atholl executed an entail of his fee-simple lands of Dunkeld, &c., in favour of a series of heirs materially different from that in the Tullibardine entail. In this entail James, Lord Glenlyon, his grace's second son, was the institute, with a substitution, to the heirs male of his body.

On the same day on which he executed this entail, the duke executed a trust bond of provision, which after reciting the entail of 1766 and the power given by it, continued thus:— " And further, considering sundry weighty considerations, it is " my intention to grant to my second son, the Right Honour- " able James, Lord Glenlyon, in the event of my decease, provi- " sions to the full amount of the three years' rents of the " entailed estates contained in the said deeds of entail, and at " present in my possession as aforesaid; and which free rents I " compute to be at present about 8000*l.* sterling per annum, " after deduction of the foresaid locality to the said duchess, " my spouse, and will, I expect, rise to a sum considerably " higher in a few years hence, and which provisions I consider " it most expedient and for the advantage of the said James, " Lord Glenlyon, to make payable to trustees for his behoof as " after mentioned." By this bond the granter bound himself to pay to the appellants, as trustees for the purposes therein mentioned, 24,000*l.*, or such sum more or less as three years'

free rents of the lands might amount to at the period of his death, "which provision is granted by me, and shall be "accepted by the said James, Lord Glenlyon, and his trustees "foresaid, for his behoof, under all the burdens and conditions "and declarations contained in the aforesaid deeds of entail, so "far as the same extend to provisions to younger or other "children besides the heir; declaring and providing always, "that if the provisions hereby granted are or shall be beyond "or contrary to the powers conferred by the said deeds of "entail, the same shall be restricted and modified, so as to be "in strict conformity thereto; and I hereby specially enjoin "the said trustees, and the said James, Lord Glenlyon, to "restrict and modify the same accordingly, so that no contra-"vention may in any case be incurred or inferred in conse-"quence of these presents."

The purposes of the trust were declared in the following terms:—But declaring that these presents are granted to the "said trustees in trust always for the use and behoof of my "said son, James, Lord Glenlyon, and his heirs, in manner "after mentioned, viz., in the *first* place, the said trustees are "hereby empowered to pay over to the said Lord Glenlyon, "during the subsistence of this trust, the annualrent accruing "on the principal sums aforesaid, and that half-yearly or "quarterly, and at such terms as they shall judge most expe-"dient; but expressly declaring that it shall not be in the "power of the said James, Lord Glenlyon, to assign or convey "either the said interest or annual produce of this provision, "or the principal sums themselves hereby provided, and that "the same, or any part thereof, shall not be arrestable or "attachable by any creditor of the said Lord Glenlyon, or "affectable by diligence for his debts or deeds of any kind. "In the *second* place, the said trustees shall invest the said "principal sums hereby provided in the purchase of lands or "other subjects in the county of Perth, and entail the same

" according to their nature and quality, upon the said Lord " Glenlyon, and the other heirs of entail named in a deed of " entail of my Dunkeld estates, executed by me of same date " with these presents, and in the same manner, and under the " same provisions and conditions as therein contained, or shall " be hereafter added by me thereto; but if circumstances should " occur to render that measure improper or inexpedient, of " which the said trustees shall be the sole judges, and as I " have the fullest confidence in the said trustees, and view the " present trust as a measure of propriety and benefit to my said " son and his heirs, I hereby give the said trustees the most " full and ample powers to lay out and invest the whole of the " said principal sums hereby provided, in whatever manner " they may judge most prudent and beneficial for behoof of the " said Lord Glenlyon and his heirs, according to circumstances " at the time, and I hereby declare my wish and intention that " the powers of the said trustees in the management of the said " provisions shall be of the most comprehensive nature, and " shall be liberally interpreted." At the date of this bond Lord Glenlyon was in insolvent circumstances, and he continued in that condition until his death.

After the death of the granter of the bond, which took place in 1830, the appellants, the trustees, drew the rents, and paid over the interest of the amount to Lord Glenlyon, who accepted the interest without objection, and in a conveyance of his estate to trustees for his creditors, excepted the bond as if beyond his controul by objection or otherwise. These payments were continued to Lord Glenlyon until his death, which occurred in 1837.

In 1839 the respondent brought an action against the appellants and Lord Glenlyon, the son of the grantee in the bond of provision, concluding for reduction of the bond, upon the ground that it was *ultra vires* of the granter; that it was not a valid exercise of the faculty given by the deed of entail, inas-

much as it was not a provision granted solely in favour of the son, of which he could enforce payment, there being no obligation imposed upon the trustees to pay or account to him, but a provision granted with a mere discretionary power to pay the annualrent to him, if they should think proper, and with a power to entail the principal sum on his heirs-male, and the heirs of entail in the Dunkeld estates, in fee; a provision inconsistent with the authority in the Tullibardine estate to grant provisions to younger children under which the bond professed to be granted.

The only issue taken by the appellants in defence was that the bond was *intra vires* of the duke.

The Lord Ordinary ordered minutes of debate, which were reported by him to the Court. The Court directed the papers to be laid before the consulted Judges for their opinions. The Judges were divided in opinion in regard to the validity of the bond. The majority held, "1st. That the late Duke of Atholl "had only power, under the entail of Tullibardine, to burden the "future heirs of entail with three years' rents of the entailed "estate, according to the free rental thereof at the period of his "death, and that his grace had no right to appoint the capital "of such provision to be raised out of the rents payable to the "present duke on his succession. 2nd. That the bond under "reduction can only be sustained to the effect of entitling the "trustees to claim from the present duke the interest of the "provision authorized to be paid to the late Lord Glenlyon; "but that, *quoad ultra*, no effectual burden was created on the "entailed estate."

The Court, on the 20th May, 1840, pronounced the following interlocutor:—"Having considered the minutes of debate, "opinions of the consulted Judges, and whole cause, they, in "terms of the opinions of the whole Judges, find, that the bond "sought to be reduced is not valid and effectual, except to the "extent of the annual rents provided therein to be paid to the

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" late Lord Glenlyon during his lifetime, in so far as the said " annualrents do not exceed the interests payable on a capital " sum equal to three years' free rents of the entailed estates, " and with this qualification and exception, decern and declare " in terms of the libel."

The appeal was against this interlocutor.

*Mr. Turner* and *Mr. Anderson* for the Appellants.—The clause in the entail under which the provision was granted, is not to be construed strictly. In all statutory provisions made by heirs of entail under the 5th Geo. IV., cap. 87, which is a statute in derogation of the restraining clauses in entails, the statute is construed strictly, and the provision must be given in the precise mode, and be confined to the extent specified by the statute. But where the provision is made by an heir of entail under a power given by the entail itself, the power is entitled to a liberal construction. The heir of entail is in the eye of law proprietor in fee-simple, except in so far as the entail upon the strictest construction fetters his powers. The presumption is in favour of liberty and against restraint.

The power here takes three years' rents out of the fetters of the entail. To this extent it gives the heirs the full powers which they would have had but for the fetters, and it does not impose any condition upon them as to the manner in which they are to dispose of the rents thus set free.

Although the form of the bond was a trust, and not a direct gift, the substantial benefit was given to Lord Glenlyon; so that even if the power be construed as not giving an absolute power to the heir over the money set free from the entail, but a power limited by its exercise being for the benefit of his children,—that was here observed. The form of a trust was adopted, because of the son's circumstances at the time of the provision, which circumstances continued up to the time of the son's death. But for the interposition of the trust, any

provision given to him would have been carried off by his creditors.

In another view, a gift to A and his children is not the less a provision for A, that his children are introduced; it is still for his benefit. It is, in fact, an absolute gift to him. The restrictions upon the provision were for the benefit of Lord Glenlyon himself, if the state of his circumstances be taken into account,—and they cannot be excluded.

[*Lord Chancellor* (*Lyndhurst*).—That argument may go the length, that giving the smallest portion to children and the remainder to grandchildren will be within the power.]

If his lordship, instead of being insolvent, had been imbecile, a form of execution, which should have guarded him from the effects of his condition, would surely have been a good execution of the power; and why not one which protected him, or rather the provision, from the effects of his insolvency? Unless the trust be a good mode of effecting the provision, there was no way in which the duke could have exercised the power for his son's benefit, that would have saved the provision from going to the son's creditors.

The provision was in substance a gift to Lord Glenlyon in liferent, and his children in fee; but power was vested in the trustees to have changed this, had his lordship's circumstances altered, and even to have paid over the money to him, without investment at all. The fullest discretion was given to the trustees, in this as in every respect. Even, however, viewing the provision as a gift to him in liferent, and his children in fee, it would still be within the power; for a power to provide *children* will include *grandchildren*. *Smollett*, in note to *Wemyss* v. *Traill*, 23 Nov. 1810.

Although the trustees were directed to invest the money in the purchase of lands to be entailed on the same series of heirs as in the entail of the Dunkeld estates, yet that direction is immediately qualified by a discretion given to the trustees, if

the measure of entailing should be improper or inexpedient, to invest the money in whatever manner they might judge most prudent and beneficial, "for behoof of the said Lord Glenlyon "and his heirs." So that the son and his heirs, not the heirs of entail, are the parties whose interests the trustees are to consider.

Moreover, in case the bond should not be within the power in the entail, the trustees are specially authorized, and indeed enjoined, so to modify the provision as to make it conform to the power; so that the bond may be good so far, though void as to the direction to entail, if that direction was in truth *ultra vires*.

But further, Lord Glenlyon, the party interested, homologated the bond, by accepting the provision given by it. If he, the party interested, did so, it is *jus tertii* of the respondent to object to its validity.

*The Lord Advocate* and *Mr. Kelly* for the Respondent.—The provision which the entail authorized was a money provision for the benefit of Lord Glenlyon personally, as a younger child. The provision, however, was so framed as to be neither a money provision, nor given to him directly, which alone the power authorized. It is to be vested in trustees, and all that these trustees are authorized to give him personally, is the interest of the sum provided; and even as to that, they are merely *empowered* to pay him over the interest,—they are not directed to do it. So that Lord Glenlyon, instead of having the capital, had only the interest; and that not absolutely, but dependent on the will of the trustees. He had not even a liferent in the sum provided.

The propriety or expediency of interposing the trust in the way in which it was done, however reasonable, or dictated by the circumstances, will not answer the objection to its legality.

But even admitting that the circumstances of Lord Glen-

lyon rendered some precaution for protection of the provision necessary, the full benefit of it might still have been secured to him, either by the purchase of an annuity, or by partial payments declared to be alimentary. It was not necessary for his protection, that the money should be invested in the purchase of lands, and still less that these lands should be entailed, and that not upon the heirs in the entail, under which the provision was made, but upon the heirs in an entirely different entail, and of a different series.

No doubt the trustees are authorized, if the measure of entailing should be deemed improper or inexpedient, to adopt another investment; but of the necessity for this, the entire judgment is placed in them,—that is, they are not to modify the granter's own words so as to make the effect of the bond consistent with his intentions, but so as to make it consistent with the legal effect of the entail, of which they are constituted judges.

Elsewhere power is given to the trustees, in case the provision should be contrary to the entail, "to restrict and modify," —not to modify only. These words, taken in connexion with what precede, have reference not to the mode or form of the provision, but its amount, as being within or exceeding that allowed by the entail. Accordingly, there follows an injunction, not upon the trustees only, but also upon Lord Glenlyon, to make the modification and restriction.

However this may be, a power to be exercised by one person cannot be delegated to another. It was not competent, therefore, for the duke to devolve upon the trustees the discretion of fixing how far the provision was within the power given—the impropriety or expediency of the investment—or the extent of the provision. If the money were once paid over to the trustees, what control can the heir have over them, that they will exercise the discretion given them, as to the mode of investment, so as to make it within the terms of the entail, and that

they will not adhere to the trusts of the bond as expressed in it, by giving the benefit of the provision to the heirs under the Dunkeld entail?

If the bond has not been executed according to the form and extent allowed by the entail, it does not constitute a charge upon the lands, and the heir in possession is entitled to be relieved from it. And with regard to homologation by Lord Glenlyon, he was, by his position, incapable of it. The duke had power, but was not under any obligation, to make the provision for him. Had Lord Glenlyon been disposed, therefore, there was no right in him by which he could have challenged the provision. If he could not in any view quarrel it, he was incapable of homologating it.

LORD LYNDHURST.—My Lords, in this case the successive heirs of entail had a power reserved to them of providing for their younger children, to a limited extent, out of the entailed estate. The only provision made by the bond in question for Lord Glenlyon, a younger child of the Duke of Atholl, the then heir of entail, consisted of the annualrent of the sum secured upon the estate by that instrument. He took no interest in the principal sum, and had no power whatever over it. He was not even allowed to charge or anticipate the income. This was the whole amount of his interest. The grant so far was within the power, and to this extent the bond of provision was, I consider, undoubtedly valid, for I cannot acquiesce in the objection, which was rather hinted at than urged, viz., that the bond which secured this income was not given to Lord Glenlyon directly, but was executed to trustees for his benefit. But the trustees after, in the *first* place, paying the annualrent to Lord Glenlyon, are directed, in the *second* place, to invest the principal in land, and to entail the same upon Lord Glenlyon and the other heirs of entail named in the entail of the Dunkeld estates.

Now the power given was to charge the estate with a sum of money, in order to provide for younger children. It would not, I conceive, be a valid execution of such a power to do this, for the purpose of applying the money in the purchase of land to be entailed upon a particular series of heirs, which, though including children, extended also to other and more remote relations. The provision was to be for the benefit, that is, the exclusive benefit, of the younger children. And, indeed, upon this point, although differing from the majority of his brethren in the general conclusion, one of the learned Judges in the Court of Session, (Lord Medwyn,) observes that he had no doubt that the Duke of Atholl did what he had no legal title to do, when he authorized his trustees to invest this provision in land, and entail it on a series of heirs; because this was not within the terms of the permissive clause.

But then there is a power given to the trustees to modify any of the provisions of the bond. This is relied upon by the appellants. It is to this effect, viz., that "if the provisions hereby "granted are or shall be contrary to the powers conferred by "the said deed of entail, the same shall be restricted and modi- "fied so as to be in strict conformity thereto, and the trustees "and Lord Glenlyon are enjoined to restrict and modify the "same accordingly." Under this clause it is supposed that the trustees could apply the sum secured by the bond as they might think proper, for the benefit of Lord Glenlyon's children. But the power reserved by the deed of entail was to be exercised by the heir of entail for the time being. It was in its nature discretionary to be exercised in favour of younger children, as he might think fit; and I concur, therefore, in opinion with those among the learned Judges who consider that the power could not be delegated or transferred. A power which is to be exercised in favour of others according to the discretion of the person in whom it is vested, cannot, by the law of this part of the island, be delegated or transferred.

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The decisions upon this subject are collected in Sir Edward Sugden's valuable *Treatise on Powers*. After referring to them, he observes that this is a settled point: v. ii. p. 214, 7th edit. The principle is of universal application; and no decision or dictum to the contrary has been referred to from the law of Scotland.

It is said that a permissive clause of this kind in a deed of entail is to be construed liberally; that the subject over which the power is to be exercised may be considered as taken out of the entail, and may therefore be disposed of according to the will of the heir of entail. But admitting that the clause is to receive a liberal interpretation, still the charge can only be made for purposes which, upon a fair interpretation, come within the power. Here the power was to provide for younger children. The heir of entail might have executed that power in favour of those children, distributing the money among them in any proportions he might have thought proper. He gave the interest of the fund, and that only, to Lord Glenlyon. The principal was left to be applied by the trustees in the purchase of land, and in settling it in a manner not within the power, or, if that could not properly be done, in the exercise of a discretion which the law will not sanction.

I may further observe, that the authority thus attempted to be given to the trustees never was exercised nor any step taken for that purpose, during Lord Glenlyon's lifetime, or, indeed, at any subsequent period. It cannot now be exercised as a provision for him; nor can it, I conceive, be apportioned among the children by the trustees, as the Duke of Atholl could not confer such an authority upon them.

With respect to the reliance placed upon the acquiescence of Lord Glenlyon, the answer given by two of the learned Judges of the Court of Session is, I think, conclusive. He had no authority to do otherwise: he had no right whatever to object, and his acquiescence is therefore wholly immaterial.

I submit, therefore, to your lordships, that the judgment of the Court below ought to be affirmed.

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LORD CAMPBELL.—My Lords, I take entirely the same view of the case as my noble and learned friend who has preceded me. He has stated the subject in such a lucid and satisfactory manner that it seems to me quite unnecessary to offer a single observation upon the point.

It is ordered and adjudged, That the said petition and appeal be, and is hereby, dismissed this House; and that the said interlocutor, therein complained of, be, and the same is hereby affirmed. And it is further ordered, That the appellants do pay, or cause to be paid, to the said respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

[HEARD *7th May*—JUDGMENT *28th August*, 1846.]

THE VERY REVEREND DR. WILLIAM JACK, Principal, and the PROFESSORS of the University and King's College, Aberdeen, *Appellants.*

SIR THOMAS BURNETT, of Leys, BART., *Respondent.*

*Mortification.—Trust.—Charity.—Absolute or Conditional.*—A gift, by a deed, in the form of a contract between the donor and a college, whereby the donor granted to the college for the maintenance of bursars in a specified manner, lands, the rents of which at the time were inadequate for the purpose intended, under a condition for re-entry in case of non-performance, and whereby the college as superior of the lands released the donor from past and future feu duties, is a gift of the lands to the college for its own use absolutely, subject to the maintenance of the bursars in the condition, and in no better condition, than that specified, although the lands may have so improved in value as that the rents have become more than adequate for that purpose.

BY the charter of erection of King's College, Aberdeen, among other persons to form the members of the college, it is declared that there shall be thirteen scholars unable to provide for themselves, who are to be supported in the college for three years, and for that purpose the following provision is made for them: "Tredecim insuper in artibus studentibus, cuilibet de "duodecim eorundem, duodecim marcas solven per procuratorem "communem dicti collegii, pro eorundem sustentatione in escu- "lentis et poculentis una cum cameris et aliis asiamentis infra "idem collegium gratis, et pro deo cum omni charitate et man- "suetudine ministretur. Tertio decimo studenti quinque tan- "tum libras, de annuis redditibus per præfatum quondam "magistrum Duncanum Scherer fundat. Inter quos, quilibet

" per vices deputetur pro custodia portarum loci mandato prin-
" cipalis sub-principalis et actu regentium pro tempore prout
" eis videbitur expedire, assignetur et deputetur qui custodiæ
" ejusdem exactam habebit diligentiam ita quod quilibet in turno
" suo per se et non per alium hebdomadim hujusmodi officium
" exercebit."

On the 6th and 12th of October, 1648, a deed was executed whereby it was " contractit endit and finallie aggreit betwix the " pairties following to witt the Richt Worschipfull Sir Thomas " Burnett of Leyis Knicht Barronett heritabill proprietar of the " croftis landis and otheris underwritten on the ane pairt and " the Richt Reverend Dr. William Guild, principall of the said " colledge Mr James Sandilandis civilist and commoun pro-" curatour of the samen and remanent professouris masteris and " memberis thereof under-subscryveris on the oyr pairt in maner " forme and effect efter following That is to say forsameikill as " the said Sir Thomas Burnett of Leyis taking to his serious " consideratioun the great utilitie and proffeit quhilk may " redound to the kirk and commounwelth be the floorisching " of schoolis colledges and seminaries of learning quherein the " zouth may be so educat and trained that therefter be Godis " guid providence they may becum guid instrumentis in kirk " and commounwelth and considdering that it fallis out ofttymes " that many guid spiritis for laik of meanis to maintene thame-" selffis at schooles and colledges are forcit to leive off the cours " of thair studies and to tak thameselffis to servile traidis and " oyr baser imployments and the said Sir Thomas carieing ane " great deale of respect and affectioun to the said Kingis Col-" ledge of Auld Abdn. as to the place quher he had his educatioun " thairfore the said Sir Thomas for the glorie of God the weill " and utilitie of the churche and commounwelth the advancement " of learning in the northerne pairtis of this kingdome the sup-" plie and help of some poore ones that cannot be abill to main-" tene thameselves at colledges and out of the speciall love favor

" and respect that he carries to the said Kingis Colledge of Auld " Abdn. hes mortefeit foundit and in maner underwritten and " upone the conditiounes efter-specifeit provydit thrie burseris " of philosophie to be educat brocht up and maintenit everie ane " of thame for the space of four zeiris at the said Kingis Col- " ledge of Auld Abdn. according to the maner measour and " qualitie and as the rest of the burseries of philosophie pre- " sentlie in the said colledge alreddie foundit are educat and " entertenit Upone the speciall provisioun and conditioun quhere- " upone this present mortificatioun dispositioun and resignatioun " efter-specifeit is grantit expresslie That the nominatioun and " presentatioun of the saidis thrie burseris sall appertene and " belong to the said Sir Thomas Burnett all the dayis of his " lyftyme and efter his deceise to his airis-maill and successouris " lairdies of Leyis with power onlie to the said Sir Thomas and " his forsaidis to nominat and present to the principall masteris " and memberis of the said colledge of quhat sort and qualitie " it sall pleise thame now and in all tyme cumming and how " oft any of the saidis places sall be vacant efter the ending and " expyring of any of the saidis thrie burseris thair quadrienniall " course or deceise of any of thame or be the leiving and desert- " ing of the said colledge befoir the ending of the four zeiris or " any uther maner of way they sall happen to vaik That the " onlie presentatioun as said is sall appertein to the said Sir " Thomas and his foirsaidis and the said masteris and memberis " of the said colledge sall not refuse any quhom the said Sir " Thomas and his foirsaidis sall present to thame to any of the " saidis thrie places they being lauchtfullie vacant ay as said is " and gif it sall fall out that in any tyme cumming the masteris " and memberis of the said colledge sall prejudge and wrong " the said Sir Thomas of his presentatioun and sall refuise and " not accept quhom they sall present to thame to any of the " saidis thrie benefeices than and in that caice it is speciallie " aggreit and provydit be the tenor of thir presentis that this

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" present mortificatioun with the dispositioun and resignatioun
" efter-specifeit sall be null of itself and have no strength force
" nor effect as gif the samen had never been maid and the said
" Sir Thomas and his foresaids sall have regress to the landis
" and otheris efter-specifeit notwithstanding of thir presentis
" It is alwyse declarit and aggreit upone betwix the saidis pairties
" that the said Sir Thomas and his foresaidis sall be holden to
" observe the ordinary tyme about Michelmes quhen the rest
" of the burseris are presentit and do enter to the colledge
" querin gif he or his foresaids sall fallie in not observing the
" deu tyme in presenting to any of the saidis places that sall
" happen to be vacant at leist befoir Hallomass in the samen
" zeir than and in that cais it sall be lawful to the saidis mas-
" teris and memberis of the said colledge to receive any poore
" scoller according to the qualitie requyrit in the rest of the
" burseris of old foundit in the said colledge to any of the said
" vacant places of the said thrie burses now fundit be the said
" Sir Thomas that sall happin to be vacant for the tyme and
" the said Sir Thomas and his foirsaidis their richt of presen-
" tatioun for that vice allenarlie sall fall in the handis of the
" masteris and memberis of the said colledge *jure devoluto* and
" to the effect the saidis thrie burseris may be honestlie main-
" tened at the said colledge and for defreying the charges and
" expensis of their enterteinment the said Sir Thomas Burnett
" bindis and obleises him his airis and successouris als weill
" airis-maill as airis of lyne tailzie or provisioun and airis or
" successouris quhatsomever heritablie and irredeemablie to
" sell assigne analie and dispone lykeas by thir presentis he
" for himselff and his foresaidis sells analies and dispones
" heritablie for the enterteinment and maintenance of the thrie
" burseris above-writtin To the said Doctor William Guild
" principall of the said colledge and Mr. James Sandilandis
" civilist and commoun pr·or of the samen and remanent
" masteris and memberis thereof and their successouris in that

" places all and haill those four croftis of land lyand about the " burgh of Aberdeen heritablie pertaining to him and disponit " to him," &c., " with the haill fruittis proffittis and emolu- " mentis of the saidis landis and croftis in all tyme cumming " and the said Sir Thomas and his foresaidis assignis and " disponis to the saidis masteris and memberis of the said " colledge and their successouris all title and interest that they " or their authors have had or anywyse may pretend to have in " and to the said four croftis of land and pertinentis of the " samen the saidis masteris of the said colledge thair entrie " to the samen to have been and quhilk began at the feist and " terme of Witsunday last bypast in this instant zeir of God " J^m^vi^c and fortie-aucht zeiris and so to continue *in perpetuum* " in the peaceabill possessioun bruiking and josing of the " samen but any troubill mollestatioun impediment obstacle or " gaincalling quhatsomevir for the causes and upon the con- " ditiouns above expresst and in respect the saidis masteris and " memberis of the said colledge are superiouris of the croftis " and otheris above-written of quhom the samen is and has been " holden of the undoubtit superiouris thir many zeiris bygane " and so far their securitie in the saidis landis and croftis they " will not stand in neid of any new infeftment be chartour and " seasin in the samen but the said Sir Thomas his resignatioun " of the samen in their hands as superiours for the causes " above and efter specifit will be sufficient for thair securitie " that the proppertie may be consolidat in the superioritie " Thairfore and for performing of the said resignatioun the said " Sir Thomas Burnet makis nominatis creattis constitutes and " ordains

" or any of them con·lie and " sevrallie his verie lauchtful undoubted and irrevocabill pro- " curatouris actouris factouris and speciall erend beireris givand " grantand and committand to thame and everie ane of thame " his express power mandat and bidding to pass to the per-

" sonall presence of the principall common procuratour and " remanent memberis of the Kingis Colledge of Auld Aberdeen " undoubtit superiours of the said four croftis of land and thair " in his name and his foresaids with staff and bastoun and " due obeisance as becometh to resign renounce and upgive the " said four croftis of land with the haill houses biggings zairdis " partis and pendicles of the samen in thair handis as in the " handis of the immediat and undoubtit superiouris of the " samen to remane with them for the aliement and enterteinment of the said thrie burseris and according to the provi- " siounes and conditiounes above expresst *ad perpetuam rema-* " *nentiam* that in thair persons as superiouris now the proppertie " of the said four croftis and thir pertinentis may be consolidat " with the superioritie of the samen and that they resigne and " renounce all tittill richt or interest that the said Sir Thomas " Burnett or his foirsaidis has had or anywyse may pretend to " have to the said four croftis of land and their pertinentis " above written in favouris of the said masteris and memberis " of the said colledge for now and evir ffirme and stable holding " and to hold what the saidis procuratouris or any of them sall " do in his name or his foresaidis and the said Sir Thomas " Burnett obliases him and his foirsaidis to warrand this pre- " sent mortificatioun dispositioun and resignatioun fra his awin " propper fact and deid allenarlie that is to say that the said " Sir Thomas and his foirsaidis hes not nor sall not do any fact " or deid prejudiciall to thir presentis and the principall com- " moun procurator and remanent masteris and memberis of the " said colledge for themselffis and their successouris acceptis " of this present mortificatioun dispositioun and resignatioun " according to the conditiounes and provisiounes above rehearset " and discharges the said Sir Thomas and his foirsaidis of all " bygane fewdewties preceding Witsunday J^m^vi^c and fourtie- " aucht zeiris and the said Sir Thomas Burnett hes instantlie " delyverit to the said principall and commoun pro^r of the said

" colledge the haill wryttis and evidentis that he hes pertening " or belonging to the saidis croftis excepting onlie the last " chartour granted to himselff with the colledge confirmatioun " of the samen quhiche he grantis him to have retenit not to " prejudge the said colledge in any cais in thair securitie or " that he myndis to reserve any richt of the saidis croftis to " himselff or his foirsaidis in cais the memberis of the said " colledge sall not faill in the performance of the conditiounes " of this present mortificatioun bot onlie in cais it suld happen " the saidis masteris and memberis of the said colledge or thair " successouris to invertte this present mortificatioun and not " to observe the conditiounes above rehearst that than he or his " foirsaidis according to the claus above writtin may have ane " eisier access and regress agane to the croftis and landis above " specifeit and for the masteris and memberis of the said " college thair securitie the said Sir Thomas obleisses himselff " and his foirsaidis to give unto thame ane judiciall transumpt " of the said chartour and ratificatioun of the samen quhenevir " they sall be requyrit thereto."

At the date of this contract and for seventy years afterwards, as alleged by the appellants, the yearly revenue of the four crofts conveyed by it was about 85*l.* 1*s.* Scots and previously to and at the date of the contract the college, as the superiors of the lands, were in the receipt of 20*l.* Scots, of feu duty out of this 85*l.* 1*s.* The original bursars founded by Bishop Elphinstone, who were referred to in the contract, were then receiving out of the general funds of the college 40*l.* Scots each, per annum, or 3*l.* 6*s.* 8*d.* sterling for their maintenance. And for seventy years after the date of the contract the college paid the Leys bursars the same sum as they were then paying to the college bursars, viz., 40*l.* Scots per annum, or 120*l.* for the three together.

In 1717 the college upon occasion of a royal visitation, returned the following answer to the visitors respecting these Leys bursars: " That Leys three bursars are maintained out

" of the rents of the crofts of land called Leys Great and Little " Croft, and Collation Croft, the yearly produce whereof is 19½ " bolls of bear, which, *communibus annis*, can be reckoned no " better than 81*l.* 5*s.*, at the estimate of 4*l.* 3*s.* 4*d.* per boll, " though the college has, since anno 1648, when this mortifica- " tion was made, paid yearly to each of these bursars 40*l.*, by " which means, one year with another, by this mortification " alone the college loseth about 40*l.* Scots, besides the yearly feu " and casualties of superiority, of which the college were then " superiors, which superiority as appeareth by the copy of the " mortification in the Mortification Register, was resigned, and " the masters of the college in the foresaid year, 1648, do, by " this bargain, oblige themselves, and successors in office, to " maintain these bursars *at the same rate that the other bursars* " *then founded were maintained*, which indeed the masters have " hitherto so religiously observed, that, to maintain these bursars " annually, *they have actually lost by this annual deficiency of the* " *mortification more than the stock of the mortification*, besides " the accidental losses by broken tenants, by whom, anno 1700, " there is lost no less than 72 bolls of bear, of which never a " spoonful was recovered, as appears by the bill of rests of bear " contained in the procuration accounts from Michaelmas 1698 " to Michaelmas 1700, by which it may evidently appear which " way the college ran yearly in debt preceding and since anno " 1695, which the masters cannot possibly help, unless a way " be fallen upon for reducing and rectifying the mortification " and contract made betwixt the Laird of Leys and the masters " of the college in the foresaid year 1648, which, it is hoped, " the honourable Commissioners will think of."

According to the respondent, ever since 1717, the rent of the lands had been more than sufficient to defray the allowance to the bursars; but according to the appellants, there was then only a slight increase in the yearly rent, and, in 1752, a still further increase occurred, but the rents were still inadequate to the yearly allowance given the Leys bursars.

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In 1762, Lord Deskford, the Chancellor of the University, upon an application to him by the masters of the college, "determined that, for this year, each of the founded and Leys "bursars shall be paid 60*l.* Scots, and that they shall continue "to be paid at that rate, but subject to alterations, if, upon "inspection of the college accounts, or from any unavoidable "incidental expenses, it shall appear that the college funds are "not able to afford them so much." Thenceforth, the Leys bursars, along with the general bursars, were paid 60*l.* Scots each, out of the college funds, being equal to 5*l.* sterling. This income was thenceforth and is still given to the two sets of bursars, but they have ceased to be lodged and maintained within the college, as was required by Bishop Elphinstone in regard to his bursars. At what period this ceased was not stated.

Before the proceedings which are about to be mentioned, so early as 1804, according to the statement of the respondent, and as 1824, according to the admission of the appellants, the Leys crofts acquired a new value, by the demand for building-ground, in the neighbourhood of Aberdeen. The rent received from them in 1824 was 310*l.* per annum, and now had risen to 318*l.* Subsequently to this rise in the rents, the surplus, after providing for the payment to the Leys bursars, was thrown into the general funds of the college.

The respondent, who was the successor of the party to the contract of 1648, called upon the college to apply the whole of the improved rents of the Leys crofts to the Leys bursars. Upon their failure to comply with this request, he brought an action against them for reduction of the contract of 1648, because "the defenders have inverted, and are now inverting, "the mortification made by the said deed, by refusing to receive "the parties presented to be bursars upon the same by the "pursuer, to the full benefit of the bursaries to which they "were so presented, and by applying the funds of the mortifi-"cation, or at least the greater part thereof, to their own use

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" benefit, or at least to other purposes than the maintenance " and entertainment of three bursars presented by the pursuer, " as patron of the bursaries founded by the deed of mortifica- " tion, to bursaries from the funds of the mortification; and " because it is by the said deed specially provided and declared, " that in the event of such an inversion of the mortification, " the disposition and resignation contained in the said deed " shall be null of itself, and of no force, strength nor effect, as " if the same had never been made:" and to have it declared, " that the inversion by the said defenders of the revenues of the " crofts of land, mortified as above mentioned, from the main- " tenance and entertainment of three bursars in the King's " College of Aberdeen, in terms of the above-mentioned deed " of mortification, is illegal, and contrary to the will of the " founder of the mortification, and that the pursuer is entitled, " in consequence of the said inversion of the said revenue, to " have regress to the said four crofts of land, and to make up " titles to, and enter upon possession of the same, as heir of " line of the said umquhile Sir Thomas Burnett, and to hold " the same for the entertainment and maintenance of three " bursars within the said college, to be presented to bursaries " by the pursuer, as patron under the said deed of mortification, " in terms of the deed."

The summons was afterwards altered by amendment in these terms: " or at least, and although the pursuer should not be " found entitled to have regress to the said lands in manner above " concluded for, it ought and should be found and declared, " that the said defenders hold the said lands, and are bound to " administer and apply the whole revenues of the same, for the " behoof of three bursars to be presented from time to time by " the pursuer and his successors, in terms of the said deed of " mortification, and for the entertainment and maintenance of the said bursars of King's College aforesaid."

The appellants pleaded in defence to this action,—

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I. That, according to the true construction of the contract, they were only bound, as the consideration for which the crofts were disponed to them, to maintain three bursars, to be presented by the respondent or his successors, upon the same footing with the other bursars of philosophy at King's College, founded prior to 1648.

II. That this construction having been uniformly put upon the contract by all parties concerned, for nearly two centuries, any pretence for making a higher demand, or for insisting that they held the crofts on any other footing, was excluded by prescription, both positive and negative. By the positive prescription they had acquired a complete title to the crofts, upon continuing to pay the stipulated yearly consideration; and any pretence upon which the respondent could demand back the lands was excluded by the negative prescription.

III. The contract might competently be construed by the usage following upon it; and inveterate and uninterrupted usage supported the construction maintained by them.

IV. There was no ground for demanding reduction of the contract, and the conclusions to that effect in the summons were absurd.

V. According to any construction which could be put upon the contract, they would be entitled to apply the surplus revenue now arising from the lands, after paying the bursaries, to indemnify the college for the loss sustained by reason of the revenue having been so long inadequate to pay the stipulated bursaries, and of the college having been obliged to make up the deficiency out of their own funds; and as the whole surplus was inadequate for this purpose, and could never indemnify the loss, the action was groundless and unjust.

The Lord Ordinary, (*Cunninghame,*) made avizandum to the Court upon cases by the parties, and on the 23rd February, 1844, the Court pronounced the following interlocutor: "Find "and declare, in terms of the amended declaratory conclusion

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" of the summons, that the defenders hold the lands referred to " in the summons, and are bound to administer and apply the " whole revenues of the same for the behoof of three bursars, " to be presented from time to time by the pursuer and his " successors, in terms of the deed of mortification, and for the " entertainment and maintenance of the said bursars of King's " College; and in so far repel the defences, and decern: of " consent of the pursuer, find it unnecessary to pronounce any " deliverance respecting the other conclusions of the summons."

This interlocutor was appealed from.

*Mr. James Parker* and *Mr. Mc Pherson* for the Appellants. —I. The deed of 1648 is not a purely gratuitous mortification, but it is, as its form purports, of the mixed nature of a contract and a charter. It sets out as a contract between the parties, whereby Burnett contracts that he will convey the lands in question to the college, upon condition that the college will allow him to found three bursaries, and will undertake to educate, bring up, and maintain the bursars, not in such a condition as the rents of the lands would afford, but " according to " the manner, measour and qualitie, and as the rest of the bur- " series of philosophie presentlie in the said college alreddie " foundit are educat and entertenit." And on the other hand the college, in consideration of the conveyance of the land, agrees to discharge Burnett of all arrears of feu duties owing in respect of the lands, and of all subsequent feu duties, and to allow him and his successors to nominate the bursars, and undertakes to educate and maintain them in the way prescribed.

Viewing the arrangement as a contract, no breach is alleged. The college have never refused any nominee presented to them, nor have they ever failed to educate and entertain the nominees in the same way as the earlier bursars. During more than a century, while the rent of the lands was not adequate to this expense, they did not make the condition of the bursars pro-

portionally worse, because their contract was precise and independent of the adequacy or inadequacy of the rents, that the bursars should be educated and maintained in a manner defined and ascertained; so, on the other hand, when, by the improvement of the lands the rent became more than adequate for the expense, the condition of the bursars has not been proportionally improved, and for the same reason, because their condition was ascertained and fixed by the contract. In all this there was no breach of the contract, but an adherence to it.

II. But viewing the deed of 1648 as a gratuitous unilateral mortification, the principles of law applicable to such grants are well established in England, though not so well ascertained in Scotland, and will equally defeat the claim set up by the respondent. The rule, in construing all instruments of this kind, is the intention of the granter, that was laid down by *Lord Eldon*, in the *Attorney-General* v. *Mayor of Bristol*, 2 *Jac. & Wal.* 317. But the Courts have adopted certain rules of construction in the attempt to discover the intention of the donor. One of these is, that where the whole estate is given and apportioned by the donor himself among charitable objects, so as to exhaust the annual value at the time of the gift, that circumstance is evidence of an intention to give any increased value to the same objects. *Thetford School Case*, 8 *Co. Rep.* 130; for as *Lord Eldon*, commenting upon that case, in *Attorney-General* v. *Skinners' Company*, 2 *Russ.* 435, said, "If a testator, by his will, gives the whole of the then "value of the lands to charitable purposes therein expressed, "denoting upon his will that he knows what is the whole "value of the lands, giving the yearly value is equivalent to "giving the rents and profits, and giving the rents and profits is "equivalent to giving the lands themselves." And in another passage, his lordship says,—"There are many cases which "have decided, that, where it appears on the will itself, what "was the yearly value of the estates given to charitable purposes,

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"and the testator has parcelled among the different charities "the whole of that yearly rent or value, so attributed to the "property, any future increase of rents must go to charity. "The Court seems to have said, that the testator has himself "declared what constitutes the whole of the estate, and that, in "parcelling out his dispositions to charity, he has exhausted in "charity what he himself has said constitutes the whole of the "estate; and from the circumstance of his knowing what was "the then present value of the estate, and devoting it exclu-"sively to charity, we have inferred an intention on his part "that the whole of the estate should be given to charitable "purposes."

The decision in the *Thetford Case* was followed in *Attorney-General* v. *Wilson*, 3 *My. & K.* 372.

Another rule is, that where a testator expresses upon his will an intention to devote the whole estate to charity, and, without showing upon the face of the will that he is aware of the annual value, gives so much annually as falls short of the entire annual value, and does not dispose of the surplus, the surplus shall go to the charities mentioned and not to the heir-at-law,—charity being the object of the gift, and no other object being declared, *Arnold* v. *Attorney-General*, *Duke's Char. Uses*, 591. Upon which case, *Lord Eldon*, in *Attorney-General* v. *Skinners' Company*, 2 *Russ.* 442, makes this observation,—"The Court has said, that though the testa-"tor has not pointed out what was the yearly value of the "lands, yet if he has otherwise sufficiently manifested his inten-"tion to give the whole of the estate to charitable purposes, "the increased rents must be applied to the charitable uses "which he has mentioned."

Another rule is that where a testator, without any expression of charity being his sole object, gives the whole estate, and directs certain specified sums, which do not exhaust the annual profits, to be paid out of them to charity, the payments directed are to

be taken merely as charges upon the gift; and either the surplus goes to the donee of the estate, or there is a resulting trust for the heir of the donor, *Attorney-General* v. *Mayor of Bristol*, 2 *Jac. & Walk.* 294; *Attorney-General* v. *Fishmongers' Company*, 5 *My. & Cr.* 11. In the two first cases, the donees were likewise objects of the charity; but this, it was observed, made no difference in the application of the principle. A case similar to these was the *Attorney-General* v. *Cordwainers' Company*, 3 *My. & K.* 534, where there was a gift, with directions to make payments to charities, which did not exhaust the rents at the time, and a gift over, in case of non-performance. There the donees were held not to be trustees bound to apply the improved rental in augmentation of the gifts to the charities; but to be donees upon condition, entitled to apply the surplus to their own use, after making the specific payments directed by the gift; and to the same effect was the *Attorney-General* v. *Grocers' Company*, 6 *Bea.* 526. There the testator, after declaring his intention to found a grammar-school, specifying the provision for the master and usher, and for seven poor men, "and that for the said godly intent he had taken order, and "that it was agreed" between him and the Grocers' Company, continued thus,—"And minding the accomplishment of all the "premises, and to have the same take effect, according to his "full mind and intent," therefore he devised the premises to the company, "upon the condition and intent" that they should provide the school, and make the master, usher, and poor men, certain specified payments, which were under the amount of the rental at the time of the gift, and greatly under the improved rental. Yet, although the payments, from the change in the value of money, were admitted to be inadequate to the purposes for which they were directed, the surplus rent was found to belong to the donees of the land for their own use, as being donees upon condition.

The present case comes under the last class of cases which

has been mentioned.* Burnett agrees with the college, that there shall be a foundation of three bursars, to be educated and maintained in a specified manner, that is, according to the manner in which the bursars already founded were educated and maintained. It might have been a question whether, if the college kept the condition of these new bursars until the present day the same as the condition of the original bursars was at the date of the gift, they did not comply with the terms of the gift. But they have not done so; when they have improved the condition of the one set of bursars, they have made a corresponding improvement in the condition of the other set. Burnett's intention being then to have three bursars educated and maintained in a specified manner, "to the effect the said three "burseris may be honestly maintained at the said college, and for "defraying the charges and expensis of their enterteinment," he dispones "for the enterteinment and maintenance of the "burseris above written," the lands in question, "for the causes "and upon the conditions above expresst." And by the procuratory of resignation, the lands are to be resigned, "for the "aliment and enterteinment of the said three burseris, and "according to the provisions and conditions above expresst." That is, not for the aliment and maintenance of three bursars generally, but for their aliment and entertainment "according "to the maner and measour and qualitie, and as" the original bursars were "educat and entertenit," which were "the pro-"visions and conditions above expresst."

The gift, therefore, is out and out to the college, under burden only of a fixed payment,—a payment as certain and capable of being ascertained as if it had been specified in money sterling. Upon the authority of the cases which have been cited, therefore, the college is not a trustee merely of the lands to apply the rents, whatever their amount may grow to, on the objects of the charity, but a donee under burden of specified payments, with an absolute right to the surplus.

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It is no doubt true that the payments specified exhausted the rents as they existed at the time of the gift, which in the *Thetford Case*, and *Attorney-General* v. *Wilson*, was taken as indication of intention to give the whole estate to charity, because nothing over was left for any other purpose: but here the payments did more than exhaust the rents. The rents, at the time of the gift, were unquestionably inadequate to maintain the bursars in the manner specified. That evidence, therefore, from correspondence between the amount of the rents and the amount of the payments, of intention to give the whole to the objects of the payment, which was the ground of decision in these cases, is awanting in this. This circumstance of the inadequacy of the rents, goes far to show that the case is not one of gratuitous mortification, but of contract between the parties. At all events, the deed is a gift, upon condition to make the payments,—the donee taking his chance whether the profits will be adequate to discharge them, and having the benefit of any emerging surplus. If the college, while the rents were insufficient, was bound to make up the deficiency, the conveyance must have been without reference to the amount of the rents, one way or other.

III. The inadequacy of the rents was known to Burnett and to his heirs after him; yet with their knowledge, the college maintained the bursars in the manner stipulated, at an annual loss; and when the rents became more than adequate, the college, with the knowledge of Burnett's heirs, applied the surplus to its own use. This contemporaneous and continued understanding of their relative obligations, by the parties themselves, though not conclusive, goes far to show the true meaning of the deed, and will make the House astute to support the construction which the parties have themselves put upon it.

With regard to the *Perth Hospital* v. *Butter's Mortification*, *Bell's fol. Cases*, 173, and *Ramsay* v. *College of St. Andrews*, 4 *B. M. & D.* 1366,—the only cases which have occurred upon this subject in Scotland, the gift in both of them was of the

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entire estate to the objects of the charity, to be divided equally among them, so that any question of a right in the donees of the lands to the improved rent was out of the question, and indeed was not raised in *Ramsay's Case*, for there the question was, whether the trustees of the charity were entitled to increase the objects of the charity, because of the increase of the revenue.

*Mr. Solicitor-General*, (*Kelly*,) and *Mr. Bethel* for the Respondent.—I. Although the deed uses the expression "con-"tractat endit, and finally aggreit," there is nothing in its structure which gives it the character of a contract. Although the object is expressed to be the education and maintenance of bursaries there is no obligation, by the college, either to maintain or to educate; there is nothing upon which either Burnett or his heirs could have maintained an action to compel performance. Neither is there any condition for re-entry in case of non-performance.

[*Lord Cottenham.*—If the income had been insufficient, do you carry the argument the length of saying that the college could have reduced the benefit afforded?]

Yes, or they might have reduced the number of bursars. There is no contract that they shall maintain the bursars, whatever may be the produce of the land. If the lands had been washed away by a river or the sea, where would have been the obligation to continue the benefit of the charity? What is said in the outset of the deed as to the motives of Burnett, is not contract or agreement, it is mere recital of what had led to his execution of the deed. But, even if there were a positive contract, it would not follow that the surplus rent would go to the college beneficially.

II. The deed, in truth, is a gift, upon trust, for the benefit of charity, and any surplus of the revenue, over the benefits specifically given, must be applied for the objects of the charity. Where the gift is of what is insufficient, or no more than suffi-

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cient, for the purpose intended, any surplus afterwards arising goes to the object of the charity. It is only where there is a surplus at the time of the gift, that the donee in trust takes the benefit of it. But here the whole is given for the purpose pointed out, and there are no terms of independent conveyance used, no words of conveyance which are not followed by or in immediate connexion with words specially pointing out the objects intended to be benefited: "to the effect the said "three burseris may be honestlie maintained," the granter obliges himself to convey, and when he comes to convey, it is "for the enterteinment and maintenance of the thrie burseris "above written." And the resignation is, that the lands may remain "for the aliment and enterteinment of the said thrie "burseris."

[*Lord Cottenham.*—If the object was merely to apply the rent for maintenance of three bursars, what possible object was there in referring to the other bursaries?]

As descriptive of the mode of maintenance.

[*Lord Cottenham.*—If they were merely to have the rents among them, then that was quite immaterial.]

The gift was of a small sum, not sufficient for, but to go in aid of sustentation; the recital of the deed is "for the "supplie and help of some poor ones that cannot be abill "to maintene themselves." The object of the mortification is the entertainment and education of the bursars, so far as the rents would go, and, in a manner, as nearly similar to the other bursars as the means would admit. But there is no condition that they shall be maintained up to that scale, and not beyond it if the funds would allow. The only condition is in regard to the time and manner of presentation, and the acceptance, by the college, of the patron's nominees. Accordingly, being of this gratuitous nature, the warrandice is confined to the acts and deeds of the granter only. If, therefore, the rents exceed what would be necessary for the maintenance of

the bursars, in the manner indicated, there being no other object than their benefit expressed in the gift, the surplus must go either to the improvement of their condition, or be a resulting-trust for the heir of the founder.

The rents at the date of the grant, the appellants say, were not sufficient for the purpose; of this there is no proof, but, at all events, they were not more than sufficient; the only intention of the founder, therefore, must have been to give the whole for the benefit of the charity. In the *Perth* case, *Bell's fol. Cases*, 173, the gift was for the maintenance of four poor persons, and it was held that the whole rents, though greatly increased in amount, must be applied to the charity, and could not be appropriated by the donees of the land.

[*Lord Cottenham.*—There there was no restriction as to the amount of benefit to be received by each object?]

Except that it was for the maintenance of four poor people in the hospital, who, of course, were to be maintained in the same manner as the other persons already in the hospital. So also in the *Thetford Case*, 8 *Co. Rep.*, the whole rents, as then existing, were given to be distributed in specific sums, but the rent having increased, the surplus was directed to be applied in increasing the benefit to the objects of the charity, and to the increase of the number of objects; so here the rents are given for the sustentation of three bursars, in the same manner as the other bursars, and the rents having increased, they should have the surplus among them. If a gift to charity of the whole rent, which at the time is only adequate for the purpose for which it is given, implies a gift to the charity of the whole estate, and, as a consequence, a gift of any increase in its value, by the same reasoning a gift of the whole estate, where the rents at the time are inadequate for the charity, must imply a devotion of the entire estate to charity.

[*Lord Cottenham.*—Where there is, at the time, an apparent surplus beyond the object of charity, a gift of the whole estate is, in effect, a gift of the surplus to the donee.]

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In all the cases which have been relied on by the appellants, there was either a gift with a surplus, or there were particular terms used in the gift, upon which the judgment was founded.

III. With regard to the practice under the deed, as assisting to discover its construction, there is no evidence of what is alleged, that the rents were either inadequate or more than adequate; the presumption, on the other hand, is, that they were just adequate, and no more; but, however much contemporaneous usage may be admissible to assist in the construction of a deed, doubtful or ambiguous in its terms, there is no room for its introduction here, as the deed is plain and unambiguous, and so far as the usage is contrary to the terms it is inadmissible to overrule its plain import. *Ramsay* v. *College of St. Andrews*, 4 *D. B. & M.* 1366, where usage for upwards of forty years was not allowed to prevail against the obvious terms of the deed of mortification.

LORD CHANCELLOR. (*Cottenham.*)—My Lords, differing as I do from the opinions of the majority of the Judges of the Court of Session, by whom the interlocutors appealed from were pronounced, it is satisfactory to me that the question does not turn upon any principle peculiar to the law of Scotland, but upon the construction to be put upon the instrument by which the charity was founded, to be regulated indeed by rules laid down in former decisions, of which none have been quoted from the decisions in Scotland directly applicable to the present case, but of which many are to be found in the reports of cases in England.

It is important in cases of this description, that the rules of construction should, as far as possible, be the same in the two jurisdictions; and I cannot find, in the present instance, any difficulty in applying the well-established rules, which have been adopted and acted upon in this country, to the decision of the Court of Session. In so doing, no principle which has been adopted or acted upon in Scotland will be infringed upon, nor any decision affected.

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It is unnecessary to go higher than the decision of Lord Eldon in the *Attorney-General* v. *Corporation of Bristol*, in 2 *Jac. & Wal.* 320. In that case that very learned Judge reviewed the former decisions from the earliest time, and extracted from them rules which he acted upon, and which have been the guide to all Judges who have followed him. He held the donees of the fund entitled to the surplus which was not otherwise disposed of, they having covenanted to apply the income in certain specified payments to certain charities, of one of which they were the trustees. And he said that "intention "was the principle, and that the several rules were only indexes "of the intention;" that one of those rules was, that if the donees were to lose, if the fund showed decrease in value, they ought to gain if it increased; and he came to the conclusion that the fund was given to the corporate body, subject to the charge imposed, and not as mere trustees.

In the *Attorney-General* v. *Cordwainers' Company*, 3 *My. & K.* 535, the devise was to a corporation for the purposes of the testator's will, and he gave half of the rents to his brother for life, and directed that the devisees, out of the remainder, should pay certain specified charities, and he gave the whole to his brother in fee, if the corporation should neglect to perform his will. Sir John Leach, Master of the Rolls, thus expressed himself: "This is a gift upon condition, and not "merely a trust; the condition of forfeiture proves the inten- "tion to give a benefit, the imposition of a penalty for non-per- "formance of a condition, implies a benefit, if the condition be "performed."

In the *Attorney-General* v. *Smythies*, in 2 *Rus. & My.* 717, the corporation consisted of one warden and five poor brothers; and it was directed that out of the rents 2*l.* 12*s.* yearly should be paid to each poor brother, and that the remainder should be applied to support the warden and poor of the hospital, and for repairs. Lord Brougham said, "If a fund be given to one

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" body, subject to certain payments to other parties, the latter " can only take what is given as a charge, and the surplus must " go to the donee of the fund, unless there be circumstances " clearly indicating a contrary intention." Many other cases might be referred to, confirmatory of these rules.

In the *Attorney-General* v. *Fishmongers' Company*, 5 *My. & Cr.* 11 & 16, I had occasion to consider these decisions, and recognized the doctrine upon which they were grounded.

The result of these decisions is, that, generally speaking, in searching for the intention of the donor, it will be assumed to have been to confer a benefit upon the donee, in the enjoyment of any increase of the fund. 1st. If the gift be to the donee, subject to certain payments to others. 2ndly, If the gift be upon condition of making certain payments, subject to a forfeiture upon non-performance of the condition; or 3rd. If the donee might be a loser by the insufficiency of the fund, which indeed is consequential upon the last. In the present case all these rules concur.

Independently of which, there are provisions and expressions strongly confirmatory of the intention in favour of the college. It is not a gift, but an agreement, for which some pecuniary consideration was given to the college, who were the superiors, to release to their vassal the donor, certain feu duties then due. The deed expresses the motives for the gift, which are: 1st. The promotion of learning generally. 2nd. Giving instructions to those who could not afford to purchase it; and 3rd. The donor's respect and affection for the college. It then provides, that the three bursars of philosophy are to be maintained and educated, according to the manner, measure and quality, and as the rest of the bursars of philosophy presently in the college already founded, are educated and entertained; and it provides for the presentation to three bursarships by the donor and his family, upon pain of forfeiture of the gift by the college, if they shall not give effect to it. The donor then, for the considera-

tion and upon the conditions before expressed, resigns to his superior, the college, the lands in question, and warrants the same against his own acts; and the college accepts it according to the conditions and provisions before rehearsed, and discharges the feu duties from a certain day; and it is stipulated that the donor shall retain the last charter and confirmation of it by the college, not for the purpose of reserving any title or interest in case the college shall not fail in the performance of the conditions of that mortification, but only in case they should invert that mortification, and not observe the conditions above rehearsed, than that the donor might the more easily reenter to the property.

It is here that, before the granting part of the deed, it is said, "To the effect the said three bursars may be honestly main- "tained at the said college, and for defraying the charges and "expenses of their entertainment," the donor bound himself and his heirs to sell and dispose, and did thereby sell and dispose, for the entertainment and maintenance of the three bursars above written, the lands in question; terms, which, standing alone, might seem to devote the whole to the maintenance of the three bursars; but it proceeds "to remain with them for the "aliment and entertainment of the said three bursars, and "according to the provisions and conditions above expressed," which refers to the recital of the agreement providing that "those three bursars shall be brought up, educated, and main- "tained according to the manner, measure, and quality, and as "the rest of the bursars presently in the college." This reference to the manner, measure, and quality of the education and maintenance of the bursars already existing, fixes and limits the measure of expenditure to be bestowed upon the three thereby endowed, as effectually as if specified sums had been directed to be so applied for that purpose; but this does not appear to have been sufficiently attended to in the former stage of this cause, which may account for the Perth Case in *Bell's fol. Cases*,

173, having been referred to as not only applicable to but as governing this case, whereas it wants the important fact upon which this case principally turns, namely, the limit of the expenditure to be bestowed upon the first object of the gift. In that case the lands were conveyed for the maintenance of four poor persons in the hospital for ever; and after enumerating the reserved rents of those lands it proceeded in this way, "which "yearly rent and duty the founder willed, required, and desired "to be employed, used, and bestowed, for and towards the "sustentation and maintenance in the said hospital of the said "four poor persons." In this there is no limit by reference or otherwise, as to the extent to which the poor persons were to be endowed with the rents, but all the rents then receivable were to be applied for their benefit. That case wants every circumstance which leads to a similar conclusion in the present case which is a gift to one charitable institution, subject to a condition for payment of certain sums for the benefit of others, whether the income falls short of or exceeds such sums, and with a proviso of forfeiture upon non-performance of the condition; embracing therefore, within itself, all the grounds upon which it has been held in the cases before referred to, as decided in England, that the donees are entitled to the increase of the rents, and not opposed by any case in Scotland. The object, indeed, and the principle to be applied, must be the same in both countries, namely, to discover and act upon the intention of the donor: and it would have been unfortunate if different rules had been adopted in the two jurisdictions, for the purpose of carrying this principle into effect. Fortunately that is not the case; and it is therefore open to us and it is most desirable to apply to Scotland principles which have been so well established in England, and which appear to be best calculated to effect the common purposes of both jurisdictions.

Being of opinion that the Court below have not put a right construction upon the deed of endowment, it is unnecessary to

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advert to the usage which has prevailed, amounting to a contemporaneous exposition of the meaning and intention of the parties. And I will say, that nothing advanced in argument in this case has induced me to hesitate as to the importance and correctness of the rule to which I alluded upon this point, in the case of *Attorney-General* v. *Fishmongers' Company*, 5 *My. & C.* 18. I therefore move your lordships to reverse the interlocutor appealed from, and in lieu thereof to assoilzie the appellant from the conclusions of the libel, with the costs of the suit; but of course without any costs of the appeal.

LORD CAMPBELL.—My Lords, I entirely concur in the view taken on the subject by my noble and learned friend. It seems to me quite clear that the donor here has most anxiously provided, that these three bursars should, in all time to come, be upon the same footing as the rest; that there should be no difference made. According to his notion, the privations which they might still be subject to, he thought, might stimulate their industry, and might bring them under a discipline, which according to his notion, might fit them for acting a useful part in life. Then, it being quite clear that you would violate the intention of the donor, if you were to put these bursars on a better footing than the other bursars of the college, I think that the construction which would give the whole of the increased rents and profits to these three bursars, could not possibly be the right construction to be put upon this instrument. Looking to the whole transaction, it seems to me that it was a kind of bargain between the donor and the college; for better or for worse the college undertook that if the rents and profits should fall off, still those three bursars should remain on the footing of the other bursars of the college, if the rents and profits should increase, the college, the donees, should enjoy the benefit of the increase. I am therefore entirely of opinion with my noble and learned friend, that the interlocutors appealed from should be reversed.

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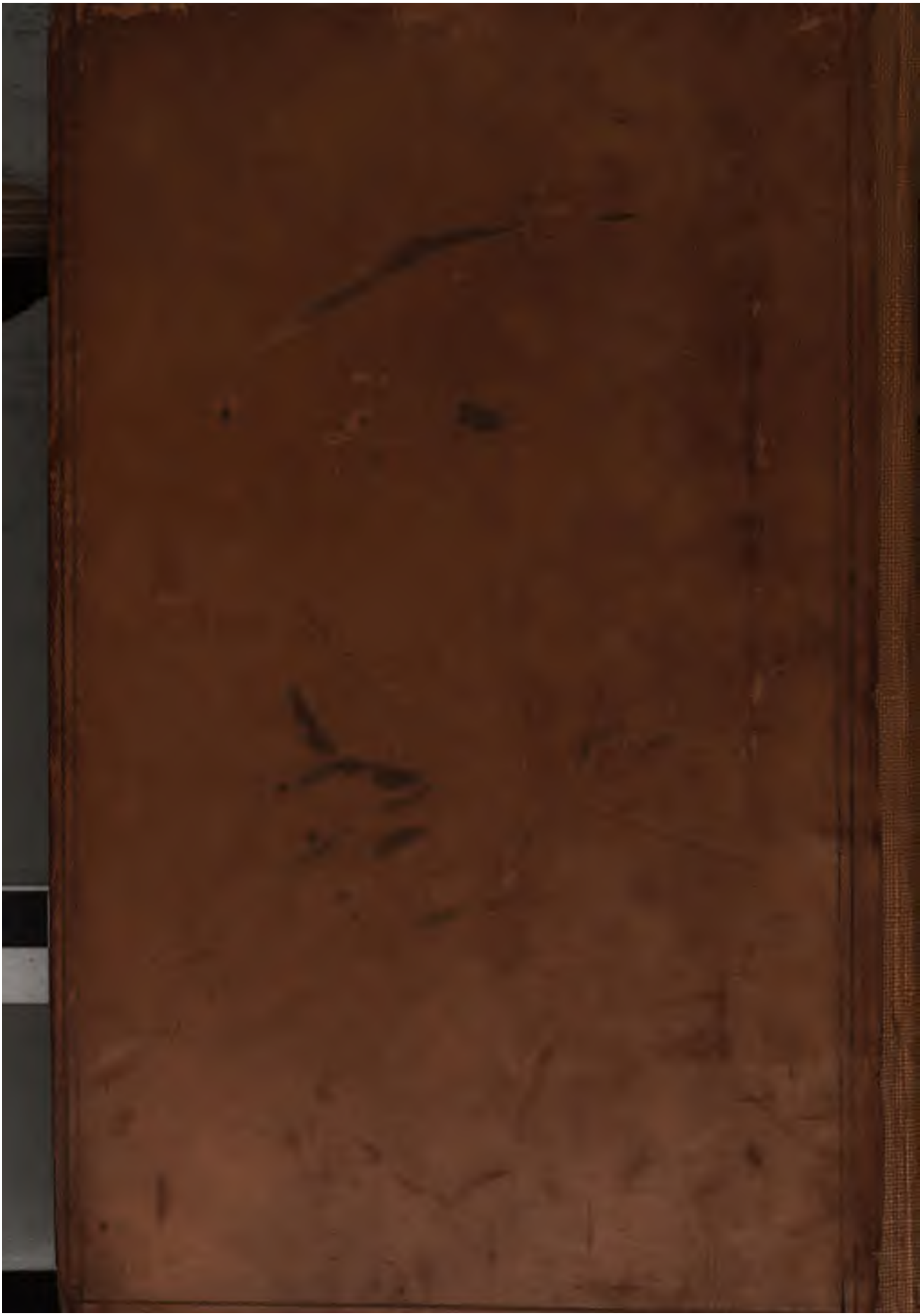
My noble and learned friend clearly showed that the *Perth* case, which was relied upon, had no application to thepresen t, and I am sure as little application had the *St. Andrew's* case; there it was quite clear that there were words expressly used and most anxiously used, just the very reverse of these indicating that the bursars who were established should have the whole of the profits, be they great or be they small.

It is ordered and adjudged that the said interlocutor complained of in the said appeal be, and the same is hereby, reversed, and that the said appellants, (defendants,) be assoilzied from the whole conclusions of the summons mentioned in the appeal, and that the respondent do pay to the appellants, (defendants,) their costs in the proceedings in the Court of Session, before bringing this appeal; And it is further ordered, that the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

G. and T. W. WEBSTER—RICHARDSON and CONNELL, Agents.

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